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FOREWORD PAGE

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CRANCH CIRCUIT COURT REPORTS VOLUME 3 1826-1829

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REPORTS
OF
CASES
CIVIL AND CRIMINAL
IN THE
UNITED STATES CIRCUIT COURT
OF
THE DISTRICT OF COLUMBIA,
FROM 1801 TO 1841,
IN SIX VOLUMES.

By WILLIAM CRANCH,
CHIEF JUDGE OF THE COURT.

VOLUME III.
1826 TO 1829.

BOSTON:
LITTLE, BROWN AND COMPANY.
1852.

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J U D G E S
OF THE
UNITED STATES CIRCUIT COURT.

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM CRANCH, CHIEF JUDGE.
HON. BUCKNER THRUSTON, } ASSISTANT
HON. JAMES SEWALL MORSELL, } JUDGES.

DISTRICT ATTORNEY.
THOMAS SWANN, Esq.

MARSHAL.
TENCH RINGGOLD, Esq.

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CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1826, AT WASHINGTON.

BAKER v. MIX, Garnishee of Buckley & Co.

An assignment of the debt by the defendant to a third person, with notice to the garnishee, before service of the attachment, cannot be given in evidence upon trial of the issue of *nulla bona*, but must be pleaded specially.

UNDER the plea of *nulla bona* by the garnishee, he offered in evidence a deed of assignment by Buckley, as surviving partner of Buckley & Co. to one Thomas Pryer, of all the effects of that firm, including the debt due to them by the garnishee, with notice thereof to the garnishee before the service of the plaintiff's attachment.

Mr. Redin, for the plaintiff, objected to the evidence, and contended that the assignment could not be given in evidence upon the issue of *nulla bona*, but should have been specially pleaded, and cited 2 Har. Ent. 308, and Sergeant on Attachments, 91, 93, that a garnishee may plead an assignment.

Mr. Marbury, *contrà*, contended that it was good evidence for the garnishee on the plea of *nulla bona*.

But the COURT, (CRANCH, C. J. *contrà*) rejected the evidence on the issue of *nulla bona*.

Mr. Marbury, moved for a new trial on the ground that the Court erred in rejecting the evidence, and the motion came on to be argued at December term, 1826.

Mr. Marbury for the garnishee. Infancy may be given in evidence upon the general issue; so may coverture; yet in one case the plaintiff may reply, necessities; and, in the other, special matter avoiding the marriage; so a parol release, or payment, and most matters in discharge of the action. 1 Chitty's Pleadings, 471; *Miller v. Aris*, 3 Esp. 234; *Sullivan v. Montague*, Douglass, 106; Sergeant's Law of Attachments, 93; *Wood v. Roach*, 2 Dallas, 180; *Stewart v. West*, *Garnishee of Jenners*, 1 Har. & John. 538; *Harding v. Hull & Tyson*, 5 Har. & John. 478; *United States v. Vaughan*, 3 Binney, 400.

Mr. Reddin, *contrà*. The plea of *nulla bona*, goes only to the

existence of the debt; an assignment does not show the debt is not due, and therefore should be pleaded specially. It admits the debt to be due at law, and is only a kind of equitable defence, which the plaintiff, who had no notice of the assignment, did not come prepared to answer upon the issue of *nulla bona*. 1 Chitty, 408.

In the case from 3 Binney, 400, there was no question as to the form of the plea. In the case from 1 Har. & John. 536, the note was negotiable so that there was no debt to the defendant after his indorsement; and in the case from 5 Har. & John. 478, the assignment transferred the legal title, as well as the equitable.

The plaintiff claims equal equity with that of the assignee, and has a legal remedy against a legal debtor of his debtor. A lien must be pleaded. *Clark v. Hougham*, 9 Serg. & Lowber, 42; 2 Esp. N. P. 536.

Mr. Marbury, in reply. In Pennsylvania a common promissory note, payable to order, is not negotiable. *United States v. Vaughan*, 3 Binney, 394. An assignment need not be a transfer of the legal right of action to enable the garnishee to plead *nulla bona*.

The COURT (CRANCH, C. J., *contra*,) refused to grant a new trial.

CHARLES MARET & SON v. WILLIAM WOOD.

By pleading the general issue the defendant admits the right of the plaintiffs to sue by the name of Charles Maret and Son, without naming the son; and a note, indorsed to the plaintiffs by that name, and produced by them on the trial, is *prima facie* evidence of the existence of such a firm.

ASSUMPSIT, on the defendant's promissory note for \$163.25, dated May 27, 1820, payable twelve months after date to one Thomas Williams, or order, and by him indorsed "to Charles Maret & Son."

Plea, *non assumpsit*, and issue. The declaration stated that "William Wood was attached to answer to Charles Maret & Son, trading under the firm of Charles Maret & Son," without naming the son, whereupon the said plaintiffs complain, &c.

Mr. Hall, for the defendant, prayed the Court to instruct the jury that the plaintiffs could not recover unless they proved, by other evidence than the indorsement, the existence of such a house or copartnership as that of Charles Maret & Son; which instruction the COURT refused to give, (THRUSTON, J., absent,) being of opinion that the defendant, by pleading the general issue, had admitted the existence of such a firm and the competency of the

Drake and Barron v. Cleveland.

plaintiffs to sue by that name; and that if the defendant had now any remedy, it must be by motion in arrest of judgment.

MORSELL, J., was of opinion that the production of the note by the plaintiffs, indorsed to them, by that name, was *prima facie* evidence of the existence of such a firm.

Verdict for the plaintiff.

 MUDD v. CLEMENTS.

In an action upon the case for seduction of the plaintiff's daughter, *per quod servitium amisit*, the plaintiff may give evidence that the defendant promised to marry the daughter, as a means of the seduction.

An action upon the case will lie for seduction of the plaintiff's daughter, whereby he lost her service.

ACTION upon the case for seducing the plaintiff's daughter, whereby he lost her service. Damages laid at \$2,000.

Mr. Lear, for the plaintiff, offered to prove a promise of marriage as the means of seduction.

The defendant's counsel, Mr. Marbury, objected, and cited 2 Phillips on Ev. 159; *Tullidge v. Wade*, 3 Wilson, 18; *Dodd v. Norris*, 3 Camp. 519, and *Foster v. Scholfield*, 1 John. Rep. 297.

But the COURT, (*nem. con.*) permitted the evidence to be given for the purpose of showing the means by which the defendant accomplished the seduction; and the defendant took a bill of exceptions. See Starkie on Ev. part 4, p. 1309, 1310; Peake's L. E. 355; and *Elliot v. Nicklin*, 5 Price, 641.

The defendant's counsel then prayed the Court to instruct the jury that this action upon the case would not lie, and that the action had been misconceived.

But the COURT (*nem. con.*) refused, saying that they might move it in arrest of judgment, if it were a substantial objection. (See 1 Chitty, Pl. 138; 2 Ib. 265, 315, 271, 422; 3 Starkie on Ev. 1307, 1308, Am. Ed. note 1; *Bennet v. Alcott*, 2 T. R. 167; *Woodward v. Walton*, 2 N. R. 476; *Macfadzen v. Olivant*, 6 East, 387; *Parker v. Elliot*, Gilmer, 33, and S. C. 6 Munf. 587.)

The defendant took his second bill of exceptions.

Verdict for plaintiff \$2,000. There was no motion made in arrest of judgment, nor any writ of error issued.

 DRAKE AND BARRON v. CLEVELAND.

The oath to obtain an attachment under the Act of Maryland, 1795, c. 56, may be made by one of the copartners, and need not state that he is the acting partner, nor that the other partners were absent.

Bell v. Davis, Cokenderfer *et al.*

ATTACHMENT under the Maryland Act of 1795, c. 56.

The COURT, (MORSELL, J., *contrà*,) was of opinion that the oath made by one of the plaintiffs, who were copartners in merchandise, in the form required by the act, was sufficient to ground the warrant upon, although he did not state in his oath that he was the acting partner, nor that the other partners were absent.

CHARLES BELL v. DAVIS, COKENDERFER *et al.*

When some of the defendants have been taken, and others not arrested, the plaintiff may amend his declaration at the trial term, in that respect, as a matter of right, and such amendments will not authorize the defendants to plead the statute of limitations.

If the defendant reads the credit side of the account, filed by the plaintiff as part of his declaration, he thereby makes the whole account evidence for the plaintiff.

THIS was an action for services rendered by the plaintiff to the defendant, in transporting the United States mail between Washington and Georgetown.

Some of the defendants, at the trial term, had not been arrested, and *Mr. Wallach*, for the plaintiff, amended his declaration according to the common practice, by stating that fact; whereupon

Mr. Key, for the defendants, offered to plead the statute of limitations, upon the ground of such amendment.

But the COURT (THRUSTON, J., absent,) refused the plea, saying that it was a matter of right to amend the declaration in that respect.

It appeared in evidence that *Mr. Burgess*, one of the defendants, came into the concern in January 1822, but the plaintiff's account included services rendered before that date, and for which that defendant was not liable, whereupon

Mr. Key, for the defendants, prayed the Court to instruct the jury that the plaintiff could not recover any part of his account prior to that date; and that all payments made since that date are to be applied to the discharge of what became due after that date.

The COURT, however, refused to give that instruction, but instructed them, that as the only evidence of the said payments was the plaintiff's account filed with and as part of his declaration, the whole account is to be received and read in evidence to the jury, as well in regard to what makes for the plaintiff, as to what makes for the defendant, but that the plaintiff cannot, in this action, recover for his services prior to the time when the

 Ryan v. Ringgold.

defendant Burgess became a copartner with the other defendants; and that the jury are to decide, from the whole evidence before them, whether the payments credited in the said account were made on account of services rendered by the plaintiff or after the defendant Burgess became a copartner in the concern.

 THOMPSON v. WELLS AND NICHOLLS.

If the defendant in replevin does not appear at the return term of the writ, the action is discontinued, and the Court will not, at a subsequent term, reinstate it, upon affidavit that the defendant requested an attorney to enter an appearance for him, and supposed it had been done.

REPLEVIN. The action was discontinued by the non-appearance of the defendant at the last term.

Mr. Key, for the defendant, now moved to reinstate it on the docket, upon affidavit of the defendant, Wells, that on the first day of the last term he requested *Mr. Key* to enter an appearance for him, and supposed it had been done.

Mr. Key afterwards withdrew his motion, being satisfied that the practice of this Court was against him.

 RYAN v. RINGGOLD.

In order to justify the marshal for arresting a man for a militia fine, it is not necessary that the list of fines should have been delivered to him by the clerk of the court-martial within fifteen days after the session of the appellate court, as required by the fourth section of the militia act for the District of Columbia.

TRESPASS, assault and battery, and false imprisonment, for arresting the plaintiff for a militia fine.

The COURT (*nem. con.*) was of opinion that it was not necessary, to the justification of the marshal, that the clerk of the court-martial should have delivered to him the list of fines within fifteen days after the session of the appellate court, as required by the fourth section of the militia act for the District of Columbia.

Mr. Morfit, for the plaintiff.

Mr. Lear, for the defendant.

ALLEN v. MAGRUDER.

In an action upon a prison-bounds bond the defendant is estopped to deny that there was such a judgment as that recited in the bond; and the plaintiff is not bound to produce the record of the judgment.

The Court will not, at the trial, permit the defendant to amend his pleadings unless they are satisfied of the justice of the defence intended to be made by the new pleas.

DEBT on a prison-bounds bond. Breach, that the defendant departed, &c. Plea, payment. Replication, non-payment, and issue.

Mr. R. S. Coxe, for the defendant, objected to the bond, because he said that there was no such judgment as that recited in the bond.

The COURT (*nem. con.*) was of opinion that upon this issue the defendant was estopped by his bond to deny that there was such a judgment; and that the plaintiff was not bound to produce the record of the judgment.

Mr. Coxe then moved to amend the pleas.

But the COURT said that they must be satisfied of the justice of the defence intended to be made by the new pleas.

Mr. Coxe did not show that the proposed amendment was necessary to the justice of the case.

Verdict for plaintiff. Motion for new trial, and in arrest of judgment, overruled.

McCOMBER v. CLARKE.

If a man writes his name in blank on the back of a note to which he is not a party either as payee or indorsee, before the note comes into the hands of the plaintiff, the presumption is that he did so for the purpose of making himself liable as the indorser of an ordinary negotiable note, and as if it had been made payable to himself or order, and not otherwise; and he is entitled to all the rights of an indorser.

ASSUMPSIT, on a note made by one Mozart, payable to the plaintiff, or order, and indorsed in blank by the defendant.

The first count charged the defendant as maker of a note, of similar import as that signed by Mozart.

The second count was upon an express guaranty of payment of the note of Mozart.

The third count also was upon the guaranty.

The fourth count was upon a promise in writing to pay the debt due by Mozart to the plaintiff.

Mr. Randall and *Mr. R. S. Coxe*, for the plaintiff, contended that they have a right to write a promissory note over the name

of the defendant, similar to that signed by Mozart; and cited, American Precedents, 49, 149; *Collins et al. v. Emmet*, 1 H. Bl. 313; *Russell v. Langstaffe*, Doug. 513; *Josselyn v. Ames*, 3 Mass. Rep. 274; *Moies v. Bird*, 11 Mass. Rep. 436; *Violett v. Putton*, 5 Cranch, 142.

Mr. Moffit, contra. The Massachusetts cases are under the peculiar law of that State.

Mr. Swann, on the same side. If the paper is blank when issued with the name upon it, it may be filled up with an absolute promise; but when the note is made payable by A to B, or order, and it be afterwards indorsed by C, you can only fill it up with such an engagement as that of an indorser. 1 Chitty, 64; *Bishop v. Haywood*, 4 T. R. 470; *Mainwaring v. Newman*, 2 B. & P. 125.

Mr. Coxe, in reply. If the defendant intended to limit his liability to that of an indorser, he would have taken care that the note should be made payable to himself in the usual form.

The COURT, on the next day, having examined the authorities cited; and having also referred to the cases of *Vowell v. Lyles*, in this Court at Alexandria in July term, 1807, 1 Cranch C. C. 428; *Cooke & Co. v. Weightman*, at the same term, 1 Cranch, C. C. 439; *Janney v. Geiger*, at July term, 1809, 1 Cranch C. C. 547; and *Offutt v. Hall*, at July term, 1808, 1 Cranch C. C. 504; the latter of which cases is precisely like the present, was of opinion, that from the appearance of the note itself, the presumption is that it was written on the paper before the indorsement by the defendant; and that the indorsement was written before the note came into the hands of the plaintiff, and on the day of the date of the note; that if such were the facts, it is natural to presume that the defendant wrote his name on the back of the note for the purpose of making himself liable as the indorser of an ordinary negotiable note, and as if it had been made payable to himself or order, and not otherwise; and that he was entitled to all the rights of an indorser.

The plaintiff then asked leave to amend, which was granted; a juror was withdrawn, and the cause continued. At a subsequent term the plaintiff became nonsuit.

JOHN GREENWELL v. CHARLES W. BOTELOR.

In replevin, the Court will, on motion, order a return of the property to the defendant, a constable, who has taken it in execution upon a judgment against a third person, unless it shall appear to the Court that the possession was obtained by the

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defendant forcibly or fraudulently, or that the possession first being in the plaintiff, was obtained by the defendant without proper authority or right derived from the plaintiff.

REPLEVIN. Motion for a return of the property to the defendant, who was a constable, and had taken the goods as the property of one Joseph W. Greenwell, under a *feri facias*, upon a judgment against him.

The COURT (MORSELL, J., *contrà*.) ordered the property to be returned to the defendant, being satisfied by evidence that the property, at the time of the defendant's taking it, belonged to the said Joseph W. Greenwell, and not to the plaintiff, and that the possession was not first in the plaintiff, and was not obtained by the defendant forcibly or fraudulently. (See the Maryland Act of 1785, c. 80, § 14.)

MORSELL, J. thought that the Act of Assembly of Maryland was intended only to aid the real owner of the goods, and not an officer serving an execution.

ALEXANDER KERR v. PETER FORCE.

In an action upon the case for a libel, if the plaintiff avers that the words amount to a charge of forgery; and if the words under the circumstances stated in the declaration, are capable of that construction, the defendant, if he would justify, must in his plea justify the words to that extent, and show in his plea, a clear case of forgery.

Whether the words are, under the circumstances stated in the declaration, capable of such a construction, is a question of law to be decided by the Court.

Whether the defendant used them in that sense, and intended thereby to charge the plaintiff with forgery, is a question of fact, arising upon the plea of not guilty, and exclusively to be decided by the jury upon all the circumstances in evidence before them. This question cannot arise upon the issue joined upon the plea of justification, because, by joining issue, the plaintiff has admitted the plea of justification to be good, if true.

The rule for construing words in a libel, differs from the rule for construing averments in a plea. In the former case, the rule is that the words shall be understood by the Court and jury in that sense which the author intended to convey to the minds of his hearers as evinced by all the circumstances of the case; but the rule of construction as to pleas, and especially as to pleas in justification of libel, is, that they shall be taken most strongly against the party pleading; and that a man shall not justify by intendment; but every thing must be precisely alleged.

The Court, in considering a plea, cannot infer one fact from another, as a jury may, but is as much restricted to the precise facts, as it is in considering a special verdict.

A plea in justification of libel must be "certain to a certain intent in general," it is, therefore, not true that a reiteration, in the plea, of the words, contained in the libel, with an averment that they are true, will be a good justification, unless the words of the libel should be so precise as to contain within themselves every thing that can be inferred from them.

The matter alleged in the justification to be true, must, in every respect, correspond with the imputation complained of in the declaration.

In order to ascertain what is the imputation contained in a libel, the Court must understand the words in the sense in which they think the writer intended they should be understood by those who should read or hear them.

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If a man, in a libel, says that he believes that another person committed a certain crime, his belief, although sincere, is no justification.

It is actionable in a libel, to charge the plaintiff with fraudulently deceiving a person as to a fact so as to induce him to indorse a note for a larger sum than he intended.

In considering the language of a plea in justification, the Court is not at liberty to exercise the same latitude of construction and inference as it may in considering the words of a libel. It is not permitted to draw any inference of fact from the facts stated in the plea.

If the libel charge the plaintiff with devising slanderous accusations against a person, the plea in justification is defective if it does not aver that the plaintiff did devise slanderous accusations against him; and if it does not set forth the particular accusations devised.

If the libel charge the plaintiff with moral obliquity, the plea in justification is defective if it does not set forth any acts of moral turpitude.

The expressions "unfairly and secretly computed," "unjustly and unfairly attempted," and "artfully and purposely framed," used in a plea in justification, and in regard to the official act of a cashier, do not necessarily imply moral obliquity.

Upon leave given to the defendant to amend his pleadings, the Court will not receive pleas in justification, which do not contain a justification of what they profess to justify.

Where the plea professes to answer only a part of the actionable matter charged in the count, if the plaintiff, by his replication or demurrer, treat it as a plea to the whole matter, it is a discontinuance. But if the plaintiff, by his replication or demurrer, treat it as a plea to that part only which it purports to answer, it is no discontinuance; provided that at the time of replying or demurring, he take judgment by *nil dicit* for that part of the count which is unanswered by the plea.

When several distinct and independent pleas are pleaded to different and separate parts of a count, the pleas are not double, and do not require the aid of the statute; and if the plaintiff may reply, or demur, to each plea, and take judgment by default, or *nil dicit*, as to all the matter not covered by each plea, in succession, so as ultimately to get judgment for all the matter contained in his declaration; yet, by the same process, the defendant, if his pleas are all good, and the issues or demurrers should be decided in his favor, will have made out a complete bar to the whole of the same matter; and as the final judgment of the Court must be given upon the whole record, that judgment must be for the defendant.

Where several distinct and valid pleas in bar, are by the leave of the Court, under the statute, pleaded to the same count, and issues taken thereon; if one of the issues be found for the defendant, and the residue for the plaintiff, yet the judgment must be for the defendant.

So if several distinct and valid pleas be, by the leave of the Court, pleaded to one and the same part of the count, and issues be taken thereon, and one of the issues be found for the defendant, the judgment, as to so much of the count as is answered by the plea, must be for the defendant, although the other issues be found for the plaintiff.

Where there are separate and distinct pleas to different parts of the count, and issues taken thereon, and some of the issues are found for the plaintiff and some for the defendant, several damages should be assessed, and judgment will be rendered for the plaintiff as to the issues found for him; and for the defendant, as to the issues found for him.

And if, instead of taking issue, the plaintiff should demur to those pleas, (as he may safely do, without fear of a discontinuance, if he confines his prayer for judgment on the demurrer to so much of his count, as the plea professes to answer, and prays judgment by *nil dicit* for the residue,) and some of the demurrers should be decided in favor of the plaintiff, and some in favor of the defendant, the plaintiff would have judgment, and a writ of inquiry of damages, as to those decided in his favor, and the defendant would have judgment upon the others.

If it appears, upon the whole record, that any actionable part of the plaintiff's declaration remains unanswered by a sufficient plea, the plaintiff must have judgment for so much, if he shall have prayed judgment at the proper time so as to avoid a discontinuance; but if it appears, from the whole record, that every actionable part of the declaration had been fully answered by a valid plea in bar, the truth of which

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has either been admitted in the pleadings or found by the jury, the judgment must be for the defendant.

- If some of the several matters pleaded be good justifications of what they profess to justify, and others be not, the plaintiff must demur to the latter, and plead over to the others. If he were to demur to the whole as one plea, and one of the several matters pleaded should be a good justification of what it purports to justify, the demurrer must be overruled in the same manner as a demurrer to a whole declaration would be overruled if any one of the counts should be good.
- If an entire plea do not answer the whole count, or if a plea to a part of a count do not answer the whole part which it professes to answer, it is bad upon demurrer, and cannot derive aid from any other plea; but when a plea to a part of a count is an answer to such part, it needs no aid from any other plea; it is sufficient for all that it professes to answer.
- If a plea be a good justification of what it purports to justify, the plaintiff cannot treat it as a nullity, and take judgment by *nil dicit*, for the whole matter contained in his declaration. He must demur or reply to the plea, and take judgment by default for what remains unanswered.
- If the plaintiff demurs to the plea, and prays judgment for the whole matter in his declaration, he admits that the defendant has answered to the whole matter, but answered badly; and as the plea professes to answer only part of that matter, the plaintiff, by such demurrer, impliedly abandons all that part which the plea does not profess to answer, and therefore discontinues his suit for so much; and a discontinuance as to part, is a discontinuance as to the whole.
- It is actionable in a libel, to charge the plaintiff with such matters "as induce an ill opinion to be had of the plaintiff," such as, to charge him with maliciously devising slanderous accusations against a third person.
- A charge of moral obliquity must be proved by some act done *malâ fide*.
- A man cannot defame in one sense and justify in another.
- The *dictum* of Starkie, "that the same degree of certainty and precision are required in this plea as are requisite in an indictment or information," is not supported by the cases which he cites to confirm it.
- All the certainty that is required, is, that the plea shall contain a clear and distinct statement of the facts which constitute the ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment.
- An averment that the plaintiff did falsely, fraudulently, and unlawfully, alter a note so as materially to change the terms and conditions thereof, is a good plea in justification of a charge of forgery.
- If there be judgment for the plaintiff upon demurrer to some of the defendant's pleas, and if issue of fact be joined upon the defendant's other pleas, the jury impanelled to try the issues of fact may be charged to assess the plaintiff's damages upon the judgment upon the demurrers, in case they should find the issues of fact for the plaintiff; but this does not give the plaintiff a right to open and close the argument to the jury where the defendant holds the affirmative of all the issues of fact.

ACTION UPON THE CASE for a libel; plea in justification, and general demurrer, and joinder.

The declaration contains two counts.

The first count, after averring the plaintiff's good character, and denying that he had ever been guilty of fraud or forgery, recites, That whereas a certain Mrs. Moulton, or Mary G. Moulton had become indebted to the plaintiff in the sum of \$125 for six months' rent of the plaintiff's house in Washington, which became due on the 15th of September, 1823; and being so in arrear the plaintiff stated an account thereof on the 10th of December, 1823, and by warrant of distress on that day authorized and directed a certain E. D. to collect the same and if necessary to

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distrain therefor, which distress was levied on her goods, on the premises, which were, by the officer making the distress, locked up in a room of the said house, and so continued unsold on the premises until the 15th of December, when, according to the terms of the lease, another quarter's rent, amounting to \$62.50, had become due, so that there was due, on that day, to the plaintiff, from the said Mary, \$187.50, for three quarters' rent, and the said Mary, being unable to pay the same, prevailed on the plaintiff to agree to take her promissory note, payable at three months from the said 15th of December, for the amount of the rent so due, with the indorsement of J. Q. Adams thereon, and prevailed on the said J. Q. A. to indorse the said note; in pursuance of which agreement the said note was so drawn and indorsed as aforesaid to the plaintiff who received the same and released the said goods which had been distrained. The said note, bearing date on the 15th of December, 1823, for the payment of \$187.50, three months after date to the order of John Q. Adams, Esq., for value received by nine months' rent to date, was, by the plaintiff, before it became payable, deposited for collection in the Bank of the Metropolis, in Washington, of which bank the plaintiff then was, and still is the cashier, and was afterwards protested for non-payment. "Previous to the indorsement and acceptance of the said note, the said J. Q. Adams had objected to the amount thereof and a letter had been written by the plaintiff to Mrs. Adams, explaining and removing the said objection, which appears in the libel hereinafter mentioned." Yet the said defendant, well knowing, &c., and wickedly and maliciously intending to injure the plaintiff in his good name &c. "and to cause it to be suspected and believed that the said plaintiff had been guilty of fraud, falsehood and forgery, and to subject him to the pains and penalties of the laws of the United States and of the said District, made and provided against persons so offending, and to vex," &c., heretofore, namely, on the 27th of October, 1824, at &c., falsely, wickedly, and maliciously, did publish, &c., of and concerning the plaintiff, and of and concerning the said rent so due as aforesaid, and of and concerning the said warrant of distress, and the levying thereof hereinbefore stated, and of and concerning the said promissory note drawn and indorsed and received by the plaintiff on account of the said rent as hereinbefore stated, and deposited for collection in the said bank as aforesaid, and of and concerning the conduct and doings of the said plaintiff in relation to the said rent, warrant, and distress, and promissory note aforesaid, a certain false, scandalous, malicious, and defamatory libel, containing amongst other things, the false, scandalous, malicious, defamatory, and

libellous matter following, of and concerning the said plaintiff, and of and concerning the said rent, warrant, distress, and promissory note aforesaid, and of the actings and doings of the plaintiff in relation thereto, that is to say,—"Mr. Alexander Kerr," (meaning the plaintiff,)—"This gentleman has lately shown himself studious to emerge from the obscurity in which he has so long moved, and to which he has been indebted for the safety in which he has moved, to seek a notoriety which must lead to his destruction. We," (meaning the defendant,) "have been reluctant to make ourselves the instruments of his exposure. We have permitted him, for months past, to exercise his ingenuity and to obey the dictates of his malignant heart, in devising slanderous accusations against Mr. Adams in silence; we had hoped that a consciousness of his own moral obliquity, and of the invulnerable nature of the character which he assailed," (meaning the character of the said John Q. Adams) "would have taught him to desist; but he has been blind to the consequences of calling down upon him the eye of the public; so true is the Latin adage, that *quem Deus vult perdere, prius dementat*."

And also this other false, feigned, malicious, and defamatory, libellous matter, of and concerning the said plaintiff, and of and concerning the warrant of distress and promissory note before mentioned, following; that is to say, "It is observable that the original warrant" (the aforesaid warrant of distress meaning) "now in possession of Mr. Adams, and which we have seen, bears marks of alteration not altogether immaterial to the consciousness of Mr. Kerr. The word 'Mr.,' at the head of it, was evidently first written Mrs., and afterwards altered to Mr. The words, 'rented by Mrs. Moulton,' at the end, also in the handwriting of Mr. Kerr, are in a different ink from the rest of the warrant, and were obviously written at another time. When the alteration was made does not appear. It came thus into the possession of Mr. Adams. We shall have occasion, before we are done, to speak of other alterations by Mr. Kerr, of other documents which it will, perhaps, not be so easy for him to explain."

Also these other false, scandalous, malicious, defamatory, libellous matters following, of and concerning the plaintiff, and of and concerning the said promissory note, and the said warrant of distress, and the said letter from the said plaintiff to the said Mrs. Adams in answer to the objections of the said John Q. Adams to the amount of the said note appearing in the said libel, or publication, that is to say,—"This letter" (meaning the letter of the plaintiff aforesaid) "it will be observed, cau-

tiously avoids all mention of the sum for which the furniture had been distrained; and by separating the account for six months furnished to Mrs. Moulton, and the statement that there was now due nine months' rent, from the assertion that he had the goods locked up in the house, to bring her to a settlement, induced Mr. Adams to believe that Mrs. Moulton had mistaken the account, first furnished her by Mr. Kerr for the sum for which the furniture was distrained, and that it was really under distress for the whole sum of \$187.50. Under that impression Mr. Adams put his name upon the note; and it was not until after it had been protested, that by the production of the warrant of distress itself, he discovered the deception." (Meaning that said plaintiff had by said letter and note, practised a fraud and deception on the said John Q. Adams.) "This was the deception" (meaning the said falsely alleged fraud and deception) "at which Mr. Adams expressed his indignation at the bank."

Also these other false, scandalous, malicious, defamatory, libellous matters following, of and concerning the said plaintiff, and of and concerning the said promissory note, and of and concerning the actings and doings and statements of the said plaintiff in relation thereto, that is to say, — "We come now to the most unpleasant part of our task, to bring an accusation against Mr. Kerr, which, if true, must not only destroy all faith in his statements, but fix an indelible stain on his moral character; — if not true we hold ourselves ready to answer, for the slander, to the laws of our country. We now distinctly charge Mr. Kerr with altering the note signed by Mrs. Moulton, and indorsed by Mr. Adams after it was so signed and indorsed and while in bank. We believe, too, the alteration was such an one as to change the terms and conditions of the note" (meaning the terms and conditions of the promissory note aforesaid; and meaning thereby that the plaintiff had altered falsely and fraudulently the said note, so as to change the terms and conditions thereof, and had therein and thereby committed forgery.)¹

2d count. And the said plaintiff further saith, that the said defendant further contriving, and falsely and maliciously intending as aforesaid, to injure the plaintiff as aforesaid, did, heretofore, namely, on the 27th of October, 1824, at &c., falsely, wickedly, and maliciously publish, and caused to be published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the plaintiff and of and concerning the said promissory note in the first count hereof before mentioned, con-

¹ Many of the obvious innuendoes are here omitted.

taining among other things the false, scandalous, malicious, defamatory, libellous matter following, of and concerning the said plaintiff, and of and concerning the said promissory note, that is to say, —

“He altered the aforesaid note, signed by Mrs. Moulton and indorsed by Mr. Adams, falsely and fraudulently, so as to change the terms and conditions thereof, and therein committed forgery.”

“He falsely made and forged an alteration in the note, signed by Mrs. Moulton and indorsed by Mr. Adams, so as to change the terms and conditions of the note,” (meaning thereby and therein, that the plaintiff had committed forgery.)

Also these other false, feigned, and scandalous words, to wit, of and concerning the said plaintiff, and of and concerning the said promissory note, to wit:

“We now distinctly charge Mr. Kerr with altering the note signed by Mrs. Moulton,” (meaning the said Mary G. Moulton in the first count mentioned,) “and indorsed by Mr. Adams after it was so signed and indorsed, and while in bank. We believe, too, the alteration of the said note such an one as to change the terms and conditions of the said note,” (meaning the terms and conditions of the promissory note aforesaid, and meaning thereby that the plaintiff had altered, falsely and fraudulently, the said note, so as to change the terms and conditions thereof, and had therein and thereby committed forgery.)

PLEA. The defendant comes and defends, &c.; and as to the publication of the matter contained in the supposed libel in the first count mentioned and referred to, and of the matter and words contained in the supposed libel in the last (second) count mentioned and referred to, says that the plaintiff, his action thereof against him, ought not to have and maintain; because, — by protestation, not acknowledging or confessing the facts and circumstances set forth by way of inducement, in the introductory part of the declaration; and further, by protestation, not acknowledging or confessing that the matter and words contained in the said supposed libel, in the first and last counts respectively mentioned and referred to, and touching the alterations made by the plaintiff in the note, and other documents therein mentioned and referred to, did import in terms, or by any fair and proper interpretation or inference from the same, did imply a charge against the plaintiff of felonious forgery, or subjected him to the pains and penalties of the laws against persons so offending, in manner and form as the plaintiff, in and by the matter of inducement in the introductory part of his declaration, and in and by the innuendoes, interpretations, and

inferences in his said declaration, has inferred and averred, — the defendant says, that before the committing of the said several supposed grievances in the declaration mentioned, and on various days and times for several months then next preceding, to wit, on the 13th of September, 1824, and on divers days and times between the 1st of July, 1824, and the 27th of October, 1824, the plaintiff had “shown himself studious to emerge from the obscurity,” &c., (repeating and averring the truth of the several allegations in the supposed libel as charged, and in the words of the original publication.)

With regard to the deception supposed to have been practised upon Mr. Adams, by the plaintiff’s letter to Mrs. Adams, the plea does not aver that it was written by the plaintiff, nor that it was written with an evil intent, nor that the plaintiff deceived anybody.

In regard to the alterations, by the plaintiff, of other documents, the defendant says, that at the time of the publication aforesaid he had, and yet has, “occasion to speak of other alterations” by the plaintiff, “of other documents, which it will, perhaps, not be so easy for him,” the plaintiff, “to explain,” and which authorized and justified the defendant (in the performance of the most unpleasant part of the task which he had undertaken, to justify the said Mr. Adams against the slander of the plaintiff, by showing that no credit was due to the statements of the plaintiff in support of such slanders,) “to bring an accusation against the plaintiff, which, if true, must not only destroy all faith in his statements, but fix an indelible stain upon his moral character;” and the defendant further, in fact, says that the plaintiff, on divers days and times before the committing of the said supposed grievances in the said declaration mentioned, or any of them, had made “other alterations” of divers and sundry documents, which authorized and justified the said accusation, and among other alterations the following, that is to say:

That the plaintiff did, at some time between the 15th of December, in the year 1823, when the said note was dated, and the 18th of March, in the year 1824, when the same became due and payable, after the said note had been signed by the said Mrs. Moulton, and after the same had been indorsed by the said Mr. Adams, and after the delivery of the same, so signed and indorsed, to the plaintiff, alter the said note; and the defendant, at the time of the said publication, did believe, and yet does believe, the said alteration such an one as to change the terms and conditions of the said note, in this, that the said note, at all the several times when originally signed by the said

Mrs. Moulton, when indorsed by the said Mr. Adams, and when delivered to the plaintiff, did not express, or in any manner indicate in its terms the nature of the consideration or value for which the same was given, but purported to be simply for value received, and so continued in the hands of the plaintiff for a long time after the delivery of the same to the plaintiff, so signed and indorsed as aforesaid; and the plaintiff afterwards, at some time to the defendant yet unknown, before the said note fell due and was protested, (which was on the 18th of March, 1824,) did, without the consent, privity, or knowledge of the said Mr. Adams, alter the said note, and add thereto, as a part of the original tenor of the said note, next following the words "for value received," the words "by nine months' rent to this date;" by which said alteration and addition it was made deceitfully and falsely to appear, that the said Mr. Adams had indorsed the said note with full notice and knowledge, expressly and distinctly communicated to him by the terms and on the face of the said note; and that the same did include and secure, and was intended to include and secure, not only so much of the said rent as had previously accrued and been distrained for, but all the subsequently accruing rent down to the date of the said note; and so the said Mr. Adams was falsely and unjustly concluded as by his own showing, in his complaint of the deception, at which he felt and expressed his indignation at the said bank as aforesaid; and could not, without being opposed by plain conclusions from such false and altered tenor of said note, allege that his ignorance, or want of recollection of the exact amount so distrained for, and of the time for which it had accrued, had been taken advantage of to entrap him into a liability beyond, and not contemplated in, the immediate and exclusive object and motives of charity, which had induced him to agree to lend his name as such surety and indorser as aforesaid; to wit, the relief of the property of the said Mrs. Moulton from the actual distress which had been levied upon the same before the date of the said note, for rent previously accrued.

The defendant averred the said note and alteration to be the same mentioned in the supposed libel. And, in order further to justify the charge of other alterations, by the plaintiff, of other documents, the defendant stated an alteration of a check, drawn by Mr. Moulder in favor of Mr. Cutts on the Branch Bank of the United States at Washington, which check Mr. Cutts passed to the plaintiff, who, finding that Mr. Moulder had no funds in that bank, (Mr. Cutts having failed to place them there, agreeably to his undertaking to Mr. Moulder,) altered the check, so as to make it appear to be a check drawn on the

Bank of the Metropolis, of which the plaintiff was cashier, and where Mr. Moulder had funds. The alteration is averred by the defendant to have been unlawfully made by the plaintiff, without the consent, knowledge, or privity of Mr. Moulder, and without any notice to him; upon which altered check the plaintiff drew one hundred dollars from the Bank of the Metropolis, "according to the said falsely and unlawfully changed tenor of the said check."

After stating, in support of the charge of moral obliquity, some transactions between the plaintiff and another person, the plea concludes thus: "For which reasons he, the defendant, at the times when," &c., "in the first and last counts of the said declaration mentioned, did publish the matter and words contained in the said supposed libel, in the said first and last counts respectively mentioned and referred to; as he lawfully might, for the causes aforesaid; and this he is ready to verify," &c.

To this plea there was a general demurrer, and joinder.

Mr. Key and *Mr. Coxe*, for the plaintiff, contended that the plea was bad, because it did not answer and justify the two innuendoes, viz., first, "meaning that said plaintiff had, by said letter and note, practised a fraud and deception on the said John Q. Adams;" and, second, "meaning thereby that the plaintiff had altered, falsely and fraudulently, the said note, so as to change the terms and conditions thereof, and had therein and thereby committed forgery."

A plea of justification must be as certain and precise as an indictment or information. *Starkie on Slander*, 179 - 340.

The plea as to the deception does not admit that the letter was written with intent to deceive; nor does it justify the words in that sense. The meaning of the words is to be left to the jury. If the words are susceptible of two meanings, one good and the other bad, the jury is to decide, under all the circumstances given in evidence, in which sense the defendant used them; and if the plaintiff avers that they were used in the bad sense, there being a colloquium of matters in reference to which the words might have been used in such bad sense, the Court, in considering the plea of justification upon demurrer, must suppose that the jury may find that they were used in such bad sense, and consequently the defendant must justify the use of them in that sense; or must deny that he used them in that sense; otherwise, a man may libel in one sense and justify in another. *Rich v. Holt*, Cro. Jac. 267; *Rex v. Lofield*, 13 East, 554; *Starkie*, 55, 228.

The defendant does not even aver that the plaintiff, wilfully,

or knowingly, or fraudulently, or deceitfully, or unlawfully altered the note. Nor, in regard to Moulder's check, is any thing criminal or unlawful charged in the plea. The defendant ought to have averred that the alteration of the note was such an one as did change the terms and conditions of the note, although in the libel he only charged that he believed the alteration to be such as to change the terms and conditions of the note. A belief of a matter of law is as much a libel as a belief of a matter of fact. If I say I believe a man to be a murderer, it is equally libellous as if I say he is a murderer. Starkie, 58, 310; *Hext v. Yeomans*, 4 Co. 15, (b.)

Mr. Barrell and Mr. Jones, contra. The construction of the words of the libel, taken *per se*, cannot be put in issue to the jury. The defendant could not have taken issue upon the averment, that the defendant meant to charge the plaintiff with fraud or forgery. The defendant is not bound to justify the words in any other sense than they import, *per se*, upon the face of the libel, unless that meaning be altered by the inducement, the colloquium, and the innuendo. Starkie, 289. If the libel be complete in itself, these are not necessary. It is not the office of an innuendo to introduce new matter; as if a man should say, you are "forsworn," and the declaration should say, "meaning thereby to charge the plaintiff with perjury," this would be bad; there being no inducement or colloquium to justify the innuendo, because that would be to submit matter of law, viz., the legal meaning of the words themselves, to the jury instead of to the Court. There can be no inferential averment in a declaration. In this declaration there is no inducement nor colloquium to justify the inference that, in point of fact, the defendant meant to charge the plaintiff with forgery. The meaning of the libel is matter of law. The jury may, by a general verdict, decide that matter of law; but it cannot, *per se*, be put in issue to the jury. Starkie, 296, 300, 302, 303; *Peake v. Oldham*, Cowp. 275; Starkie, 55.

The defendant is not bound to justify the worst sense of the words. Starkie, 309, 310. If the charge be of murder, the defendant must justify with legal precision, and state a specific instance; and so of other indictable offences. But if the charge be not of an indictable offence, certainty to common intent is sufficient. If the charge be of a fact in itself specific, it may be justified as charged, and the defendant need not aver the will and the intent. The *scienter* may be inferred. The defendant is not bound to do more than aver the truth of the facts, as charged in the libel. Starkie, 339, 340; *Wyld v. Cookman*, Cro. Eliz. 492; 3 Johnson's Cases, 198.

The innuendo is not justified by the inducement and the colloquium, and therefore the defendant is not bound to answer it. It is only necessary that the justification should be so certain and precise that the plaintiff may know what facts are intended to be proved, and be prepared to answer them. *Astley v. Younge*, 2 Burr. 807; S. C. Starkie, 339. If what is said in the libel be true, the truth is an answer to the allegation of malice in the declaration. *Holt on Libel*, 282; *J Anson v. Stuart*, 1 T. R. 748.

The libel does not charge the plaintiff with forgery. The alteration of the note may have been made by the plaintiff fraudulently, and yet be not a forgery; nor do the words, even with the aid of the inducement, colloquium, or any legitimate innuendo contained in the declaration, import a charge of forgery. It is alleged in the plea, as one of the instances of the other alterations alluded to in the libel. This is also a specific charge, and needs only to be justified in the words of the charge. The plea does so justify it; and avers the fact of the defendant's belief, that the alteration changed the terms and conditions of the note. This is all the defendant was bound to do. The belief was not of a fact, but of an inference of law, — the legal effect of the fact; and if the defendant had reasonable ground for that belief, the charge of malice is rebutted. The plea avers that it was done falsely and deceitfully, which is the utmost extent to which the defendant was bound to justify the charge. The plaintiff has no right to expound the meaning of the libel, and oblige the defendant to justify to the extent of such inflamed meaning. If justified to the extent to which the charge necessarily extends, it is sufficient.

Mr. Key, in reply. The jury are to ascertain in what sense the words were used by the defendant, (if they might have been used in one or the other sense,) from all the circumstances of the case. Whether the words can be taken in a particular sense, is matter of law. The office of the innuendo is to designate in which sense they might be taken; and such innuendo then becomes a matter to be decided by the jury, and the defendant is to admit or deny that they were used in that sense. Starkie, 281, 310; *Brooks v. Bemiss*, 8 Johns. 455; 20 Johnson, 354, 355.

November 27. CRANCH, C. J., after stating the substance of the declaration and plea, delivered the opinion of the Court, as follows: — To this plea there is a general demurrer and joinder, and the question for the Court is, whether the facts stated in the plea justify the publication of the words stated in the declaration.

The gravamen of both counts in the declaration is, that the defendant charged the plaintiff with forgery, in the alteration of Mrs. Moulton's note. If the words, under the circumstances stated in the declaration, are capable of the construction given to them by the plaintiff in his declaration, the defendant must justify them to that extent, and show in his plea a clear case of forgery. Cowp. 684. Whether the words are, under the circumstances, capable of that construction, is a question of law, to be decided by the Court. Starkie, 42, 44, 55. Whether the defendant used them in that sense, and intended thereby to charge the defendant with forgery, is a question of fact, arising upon the plea of not guilty, and exclusively to be decided by the jury, upon all the circumstances in evidence before them. This question cannot arise upon the issue joined upon the plea of justification; because, by joining issue, the plaintiff has admitted the justification to be good, if true. So the defendant would not be permitted to contend before the jury, on that issue, that he used the words in a more mitigated sense than that in which he had attempted to justify them in his plea. The Court cannot, before verdict, know whether the jury may not, under all the circumstances of the case, be of opinion that the defendant used the words in the worst sense of which they were capable; and, therefore, if the plaintiff shall have charged the defendant with having used them in that sense, the Court cannot say that a plea, which does not justify the words in that sense, is sufficient.

If, in judging of the validity of the plea, the Court should compare it only with that sense of the words which the Court should think to be the sense in which they would be generally understood by the world at large, (although the Court should be of opinion that the words were capable of the more aggravated meaning charged in the declaration,) and if, being of opinion, under the circumstances stated in the declaration, that the defendant did not use the words in that more aggravated sense, the Court should therefore decide that a plea, not justifying the words in the aggravated sense, was sufficient; and if, upon the trial, the evidence should be that the defendant actually used the words in the more aggravated sense as charged in the declaration; and if the plaintiff should thereupon pray the Court to instruct the jury, that if they should be satisfied by the evidence that the defendant used the words in that sense, they ought to find their verdict for the plaintiff, although the defendant should prove the truth of all the facts averred in his plea of justification, the Court would be embarrassed. On one hand, the plaintiff would have a right to insist that the question,

whether the defendant used the words in the aggravated sense, and with the intent charged in the declaration, (if, in point of law the words were capable of that sense,) should be tried by the jury. On the other hand, the court would have adjudged the defendant's plea in justification to be good; and he was not bound to do more than prove the truth of his averments in his plea. The Court, in such a case, in order to be consistent, must refuse to give the instruction prayed by the plaintiff, because the issue is joined upon the truth of the facts stated in the defendant's plea; and if those facts are found to be true, the verdict upon that issue must be for the defendant. A new trial would not do justice to the plaintiff, because the same issue would remain to be tried. The plaintiff's only remedy would be by writ of error to reverse the judgment of the Court who had, upon demurrer, decided that the plea of justification was sufficient.

The first question, then, in the present case, is, Whether the words stated in the declaration, taken in connection with the facts therein also stated, are capable of the sense therein imputed to them by the plaintiff?

The words charged in the last count, are, "He altered the aforesaid note, signed by Mrs. Moulton, and indorsed by Mr. Adams, falsely and fraudulently, so as to change the terms and conditions thereof, and therein committed forgery."

There can be no doubt that these words contain a direct and palpable charge of forgery, and that the plea is no justification of those words. The general issue is not pleaded; and the plea in justification, which is the only plea in the case, purports to justify all the words charged in both counts in the declaration, and concludes thus:—"For which reasons he, the defendant, at the times when," &c. "in the first and last counts of the declaration mentioned, did publish the matter and words contained in said supposed libel in the first and last counts respectively mentioned and referred to, as lawfully he might."

This surely must have been an oversight, as the defendant certainly cannot contend that the matter of the plea is a justification of these words in the last count; and I am more inclined to think so as this point was not noticed in the argument, and yet it seems at once conclusive against the plea.

I presume a distinction is not to be taken between libellous matter, and libellous words; for the plaintiff must in all cases set forth the very words, with the publication of which he means to charge the defendant; and some of those words, (and they must be actionable words,) must be proved. Starkie on Slander, 266 to 279, and 350. The averment therefore in the last count,

that the libel published by the defendant, contained that libellous matter, must mean that it contained those libellous words; and the defendant, by admitting in his plea, that he published the matter and words contained in the supposed libel in the last count mentioned and referred to, admits that he charged the plaintiff with forgery. For the only means which the Court has of knowing what the matter and words are which are contained in the said supposed libel in the last count mentioned, is the averment of the plaintiff, in that count, that it contains the matter above stated. The plea does not deny that the libel contains that matter, but avows and attempts to justify it. We cannot look into the printed libel. It is not now judicially before us. It is mere matter of evidence, to be introduced at the trial. We cannot therefore judicially see that the words before mentioned as being contained in the last count, are not in the printed paper; and we have as good a right judicially to believe they are, as that any other matter, charged in the declaration, is there.

Here there would be an end of the case; for it cannot be supposed that the matters charged in the plea are a justification of a direct charge of forgery. The plaintiff is not charged in that plea with doing any act with an evil intent, much less with an intent to injure or defraud, or even to deceive any person. The essence of the crime of forgery consists in the evil intent; the intent to injure or defraud some person.

It has been ingeniously argued that if the words in the libel constitute a charge of forgery, the same words averred in the plea, will constitute a sufficient charge of forgery to justify the words in the libel.

But the rule for construing words in a libel differs from the rule for construing averments in a plea. In the former case, the rule is, that the words shall be understood by the Court and jury in that sense which the author intended to convey to the minds of his hearers as evinced by all the circumstances of the case. Starkie, 44. But the rule of construction as to pleas, and especially as to pleas in justification of libel, (which it is said ought to have the same degree of certainty and precision as are requisite in an indictment,) (Starkie, 340,) is, that they shall be taken most strongly against the party pleading, (1 Chitty's Pleadings, 240, 241,) and that a man shall not justify by intendment; but every thing must be precisely alleged. Cro. Eliz. 492; Co. Lit. 303, (a)

The Court cannot, in considering a plea, infer one fact from another, as a jury may; but is as much restricted to the precise facts, as it is in considering a special verdict. A plea in justification of libel, must be not only certain to a common intent,

which is, in general, sufficient in pleas in bar, but it must be what Lord Coke calls "certain to a certain intent in general," and which he says is sufficient in counts, replications, and indictments. Co. Lit. 302, (a) Starkie, 176, 588, n. 14. It is therefore not true that a reiteration in the plea, of the words contained in the libel, with an averment that they are true, will be a good justification, unless the words of the libel be so precise as to contain within themselves every thing that can be inferred from them. As in an indictment, so in a plea in justification of libel, nothing material shall be taken by intendment. 2 Hawk. P. C. C. 35, § 60; Starkie, 179, 340; *Bayard v. Malcolm*, 1 Johns. 453 to 471.

"The matter alleged, in the justification to be true, must in every respect correspond with the imputation complained of in the declaration; and so, with regard to every circumstance at all material, the facts set up by way of justification in the plea must be strictly conformable with the imputation charged in the declaration." Starkie, 342.

In order to decide whether this plea be a good justification of the words stated in the first count of the declaration, we must ascertain what is the imputation complained of in that count. "It may be laid down as a general rule that wherever words are used calculated to impress upon the minds of the hearers a suspicion of the plaintiff's having committed a criminal act, such an inference may, and ought to be drawn, whatever form of expression may be adopted." Starkie, 58.

"In consideration of law that is certain which can be rendered so; it is therefore of no importance whether the terms used be doubtful, or apparently innocent, provided it can be shown that they could, or did convey the offensive meaning which forms the ground of complaint." Starkie, 75.

In ascertaining what was the imputation complained of in the first count, we must understand the words in the sense in which we think the writer intended they should be understood by those who should read or hear them. Looking then at the words charged in the first count we find them divided into four classes, each of which classes is averred to contain libellous matter.

1. The first class is that beginning with the words, "Mr. Alexander Kerr," and ending with "*prius dementat.*"

These words charge Mr. Kerr, in general terms, with maliciously "devising slanderous accusations against Mr. Adams," and with "moral obliquity."

2. The second class begins with the words, "It is observable that the original warrant," and ends with the words, "not so easy for him to explain."

These words charge Mr. Kerr with making an alteration in the warrant, by changing the letters "Mrs." to "Mr." and adding the words, "rented to Mrs. Moulton," which alteration is said to be not altogether immaterial to the consciousness of Mr. Kerr, thereby insinuating some undefined improper motive, not explained by any innuendo. They also charge him in general terms, with other alterations of other documents, which it is said will perhaps not be so easy for him to explain; thereby imputing to him still more improper, but undefined motives, not explained by innuendo.

3. The third class begins with the words, "This letter" and ends with the words, "indignation at the bank."

The imputation contained in these words, is, that the plaintiff, in writing a letter to Mrs. Adams for the purpose of explaining the reason why the note, presented to Mr. Adams for his indorsement, was for a larger sum than he supposed it would be, and to induce him to indorse a note for that larger sum, being the amount of nine months' rent, when the plaintiff had reason to suppose that Mr. Adams had agreed to indorse a note for six months' rent only, cautiously avoided to mention the sum for which the furniture had been distrained, and so artfully wrote the letter as to induce Mr. Adams to believe that the furniture had been distrained for the whole amount of nine months' rent, when in fact it was distrained for only six months' rent, and under that impression to indorse the note for nine months' rent, thereby charging the plaintiff with practising a fraudulent deception upon Mr. Adams, as explained by the innuendo.

4. The fourth class of words begins, "We now come," &c. and ends with, "conditions of the note."

The imputation contained in these words, is, that the plaintiff altered Mrs. Moulton's note, after it was signed by her and indorsed by Mr. Adams, and that the alteration was such as to change the terms and conditions of the note, and to fix an indelible stain on the moral character of the plaintiff.

To have this effect it must have been done with an evil intent, an intent to injure or defraud some person. An alteration of a note which changes its terms and conditions, must be a material alteration; and a material alteration of a note, by the holder, with intent to injure or defraud any person, is forgery.

It makes no difference that the defendant only said he believed the alteration to be such as to change the terms and conditions of the note. If I say, of a man, that I believe he committed murder, I say it at my peril. I cannot justify by saying, and proving, that I did believe it. I can only justify by proving the fact of murder or by circumstances showing the total absence of

malice. (Starkie, 58 to 61; *Hext's case*, 4 Co. 15 (b); *Harrison v. King*, 7 Taunt. 431; S. C. Price, 46. The cases cited in *Broughton's case* in Moore, 142 (b); *Stick v. Wisdome*, Cro. El. 348.)

The plaintiff, in his declaration, has averred that the defendant published these words with the malicious intent to cause it to be suspected and believed that the plaintiff had been guilty of forgery, and to subject him to the pains and penalties of the law against persons so offending; and after reciting the words avers that the defendant meant thereby "that the plaintiff had altered falsely and fraudulently the said note so as to change the terms and conditions thereof, and had therein and thereby committed forgery."

When we recollect the solemn and portentous language with which this charge is introduced by the defendant,—language calculated to give the utmost effect to the words used in making the charge,—when we find those words deliberately selected with an expectation that they would become the subject of judicial investigation; when the writer himself positively affirms that the accusation which he is about to make, is of an offence so heinous, that, if true, it must not only destroy all faith in the plaintiff's statements, but fix an indelible stain on his moral character, can we, for a moment, suppose that the defendant meant to charge the plaintiff with an innocent act? If not innocent, it must have been wicked; if wicked, it must have been done with an evil intent, an intent to injure some person. Of what crime is he guilty, who, being the holder of a promissory note, so alters it as to change its terms and conditions with intent to injure another person? Is it any thing short of forgery? I cannot help thinking, not only that these words are capable of the meaning imputed to them, but that they will be so understood by the greater number of those who shall read, or hear them. I must, therefore, consider them as importing a charge of forgery.

If the Court should be of this opinion, and that the plea is insufficient, it would not be necessary to inquire whether there are other actionable words in the declaration; however, as the Court may not concur with me, I will, before I proceed to consider the plea, go into that inquiry.

1. If the first class of words, in the first count, contain any actionable words, they are those which charge Mr. Kerr, in general terms, with "*devising slanderous accusations against Mr. Adams*;" and those which charge him with "*moral obliquity*."

At present I do not think them actionable, but shall consider them so, when I come to inquire as to the sufficiency of the plea.

2. I am very doubtful whether the second class of words in the first count, contains any thing actionable.

The alterations in the warrant of distress, do not appear to have been material; and the charge of other alterations of other documents, seems to be too vague to affect the plaintiff's reputation.

I shall, however, consider them also as actionable when I consider the plea.

3. The words contained in the third class, are, in my opinion, actionable. They impute to the plaintiff a fraudulent deception of Mr. Adams, by which he was induced to indorse a note for a larger sum than he intended. It is true that the fraudulent motive is not expressly stated; but facts are stated which excite a strong suspicion that the plaintiff knew, or had good reason to suppose, that Mr. Adams had agreed to indorse Mrs. Moulton's note for six months' rent only, that being the amount due when he was applied to by Mrs. Moulton, and that being the amount for which her furniture was distrained; and that with that knowledge, the plaintiff wrote an artful letter to Mrs. Adams, which induced Mr. Adams to believe that the furniture was distrained for the whole nine months' rent, and, under that impression, to indorse the note for that amount.

The story thus told irresistibly raises a suspicion of the motive, and leaves little room to doubt that the writer intended that it should be believed that the motive was fraudulent.

4. The fourth class of words has been already considered, and is that which contains the most serious charge.

In considering the language of the plea, we are not at liberty to exercise the same latitude of construction and inference as we may in considering the words of the libel. Technical proceedings require technical precision. We are not permitted to consider the defendant as positively averring the truth of every inference which the world would draw from the words of the libel. We are not even permitted to draw any inference of fact from the facts stated in the plea.

If the words in the first class, charging the plaintiff with maliciously devising slanderous accusations against Mr. Adams, be actionable, the plea is defective in not averring that the plaintiff did devise slanderous accusations against Mr. Adams, and in not setting forth the particular accusations which he devised. The plea, in this respect, avers the act of the defendant only. It states that the defendant permitted the plaintiff to obey the dictates of his malignant heart in devising slanderous accusations against Mr. Adams, not that the plaintiff did, in fact, devise them.

If the general allegation of moral obliquity, in the first class of words, be actionable, the plea is defective in not setting forth any acts of moral turpitude. The plea does not charge the plaintiff with doing any act with an evil intent, except in the two instances of official misconduct as cashier, in the transactions with Mr. Belt, which are specially adduced as manifestations of moral obliquity.

In the first of those instances the defendant charges that the plaintiff, (who was cashier of the Bank of the Metropolis, had undertaken to ascertain the amount due upon a certain note indorsed by Mr. Belt, and which he was about to pay into that bank,) unfairly and secretly, without notice to Mr. Belt, computed, in the sum so to be paid by Mr. Belt, a balance of account due by one Bestor, who was insolvent, and for which balance Mr. Belt was not liable, but which the plaintiff endeavored to palm upon, and extort from, Mr. Belt, under pretence of computing and ascertaining what was due upon the note for which he was liable as indorser.

In the second of those instances, the defendant charges that the Bank of the Metropolis, of which the plaintiff was cashier, having recovered judgment against Mr. Belt upon his indorsement of Appler's two notes, and Mr. Belt having \$300 which he wished to pay on account of that judgment, tendered the same to the plaintiff, and required of him, as cashier, a receipt for such payment accordingly. But the plaintiff, as cashier, under pretence of crediting Mr. Belt with the same, and of giving him a receipt therefor, but at the same time, secretly, artfully, and subtilely contriving how to deprive the said Belt of the exclusive benefit and credit of such payment, unjustly and unfairly attempted and labored, in the discharge of his duty as cashier, to have the said payment passed to the credit of the entire mass of the said Appler's debt in the said bank, for which Mr. Belt was not liable; and artfully and purposely framed, and would then and there have palmed and imposed upon the said Belt, a receipt for the said payment, so contrived and worded as to pass the said payment to the general credit of the entire mass of the said Appler's debt.

Both these instances are cases in which the plaintiff was acting as cashier, and in neither of them is he charged with fraud. The epithets used are, "unfairly and secretly computed," "unjustly and unfairly attempted;" and "artfully and purposely framed," &c., neither of which terms, used in regard to the official act of a cashier, necessarily implies moral obliquity.

The other acts charged in the plea, and which might possibly be supposed to justify the charge of moral obliquity, are, 1st. The

deception practised upon Mr. Adams by means of the letter to Mrs. Adams. But there is no averment in the plea that the plaintiff wrote that letter, or that he did any of the acts which it is averred were done by that letter; nor that the plaintiff deceived, or attempted to deceive, Mr. Adams; much less that he wilfully and fraudulently deceived him. 2dly. The alteration of the warrant of distress. This is not charged, in the plea, to have been done with any bad intent, or to have been attended by any circumstance of moral turpitude. 3dly. The alteration of Mrs. Moulton's note.

The averment in the plea, in regard to this transaction, is simply that after the note was signed, indorsed, and delivered to the plaintiff, and before it became payable, he altered the note by adding, after the words "value received," the words "in nine months' rent to this date." That this alteration was made without the privity, knowledge, or consent of Mr. Adams, and that the defendant did, at the time of the publication, believe, and does yet believe the said alteration such an one as to change the terms and conditions of the said note, in this &c., showing how the alteration affected Mr. Adams's rights, and prevented him from denying, without being contradicted by the face of the note, that he knew that the note was given for more than the sum for which the furniture was distrained. It is not stated that the alteration was made with any evil intent; and therefore it cannot be proof of moral obliquity. It is true that the words "deceitfully and falsely," are used; but they are epithets applied to the appearance which was the effect of the alteration, not to the act of altering. The words are, "by which said alteration it was made deceitfully and falsely to appear that Mr. Adams had notice, by the terms of the note itself, that it included, not only the amount of the rent distrained for, but all subsequently accruing rent down to the date of the note, and so the said Mr. Adams was falsely and unjustly concluded, as by his own showing," &c. 4thly. The alteration of Mr. Moulder's check.

The facts of this transaction, as stated in the plea, are as follows:— After stating that Mr. Moulder had drawn a check on the office of Discount and Deposit, Washington, for \$100, dated and payable at a future day, in favor of Mr. Cutts, upon the assurance that the latter would place funds in that office to the credit of the former to meet it at maturity; and after stating that Mr. Cutts, before the day on which the same was dated and made payable, passed the same to the plaintiff, who at maturity presented it to the said office for payment, which was refused in consequence of Mr. Cutts's failing to place funds there to meet it, and of Mr. Moulder's having no funds there; the defendant in

his plea, avers that the plaintiff did on the same day, "without the consent, knowledge, or privity of said Moulder, and without any notice whatever to the said Moulder, unlawfully alter and change the said check from a check drawn upon and directed to the said office of Discount and Deposit as aforesaid, to a check purporting to be a check drawn by the said Moulder, upon and directed to the said Bank of the Metropolis; and in order to effect such change and alteration, did then and there erase from the said check, all the words by which the same purported to be a check so drawn upon and directed to the said office of Discount and Deposit, and did then and there write and insert, in lieu thereof, the name and style of the Bank of the Metropolis, as the bank upon which the said check was so drawn, and to which it was directed as aforesaid; and did then and there pass the said check at the said last-mentioned bank, as a check drawn upon and directed to said bank; and by means thereof, did then and there draw out of the funds and credits of the said Moulder in the said bank, the sum of \$100, according to the said falsely and unlawfully changed and altered tenor of the said check."

It is not averred in the plea that this alteration was made with any evil intent. The plaintiff might have done it innocently. An act, not done with an evil intent, cannot be evidence of moral obliquity, although it may have been unlawful.

I have thus examined all the facts charged against the plaintiff in the plea, as a justification of the words published; and find that none of them are charged in such a manner as to justify the accusation of moral obliquity. Consequently they do not, in my opinion, justify the charge of fraudulent deception by means of the plaintiff's letter to Mrs. Adams; or of forgery, or of a fraudulent alteration of Mrs. Moulton's note, or of fraudulent alterations of other documents. The point of the slander seems to me, in every instance, to be avoided. The slander is not in the words themselves, but in the ideas which those words excite in the minds of those who hear them, and the inferences which the world draws from them. These inferences are not met by the allegations of the plea. I am, therefore, of opinion that the plea is substantially defective, as a justification of even the mildest sense in which the words may be reasonably construed.

THRUSTON, J., and MORSELL, J., concurred.

The COURT having thus given judgment upon the demurrer, permitted the defendant, without opposition by the plaintiff, to amend his pleadings; whereupon, on the 18th of December, 1826, he offered to plead fourteen additional separate pleas, of which the first four were to the first class of words charged in

the first count, beginning "Mr. Alexander Kerr," and ending "*prius demetat.*"

1. The first of the fourteen pleas only reiterates the words of the libel, and avers them to be true.

2. The second does the same, and adds an averment that the plaintiff did, with intent to injure and defame Mr. Adams, devise and publish slanderous accusations against him; and gives the reason which induced the defendant to publish the truth as to the plaintiff's character, but contains no averment of any particular instance of moral obliquity.

3. The third contains all that is contained in the two first pleas, with the addition of sundry instances of what the defendant supposes to be moral obliquity in the plaintiff.

4. The fourth purports to be a justification of the charge of moral obliquity only.

5, 6. The fifth and sixth pleas are to the second class of words charged in the first count; beginning "It is observable," and ending "for him to explain."

7, 8. The seventh and eighth pleas are to the third class of words in the first count; beginning "this letter," and ending "indignation at the bank."

9, 10. The ninth and tenth pleas are to the fourth class of words charged in the first count; beginning "We come, now," and ending "the terms and conditions of the note."

11, 12. The eleventh and twelfth pleas are to the first set of words in the first count; beginning "He altered," and ending "conditions of the note."

13, 14. The thirteenth and fourteenth pleas are to the last set of words in the second count, being the same words to which the ninth and tenth pleas purport to be an answer.

The first of these pleas begins thus: — "And the said P. F., by W. Jones and S. B. Burrell, his attorneys, comes and defends the force and injury, when, &c.; and as to the publication of so much of the matter contained in the supposed libel, in the first count of the said declaration mentioned, as is in the said count in the first place mentioned and set forth, beginning with the words, 'Mr. Alexander Kerr,' and ending with the words '*prius demetat.*,' says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says," &c. &c. "For which reasons the said defendant did, at," &c., "publish so much of the matter contained in the said supposed libel, as is mentioned and referred to in the introductory part of this plea, as he lawfully might, for the causes aforesaid," &c.; and concludes thus: — "Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him," &c.

Each of the other pleas begins thus: — “And the said defendant, by the leave of the Court here first had and obtained,” &c., “further defends the force and injury, when,” &c.; “and as to the publication of so much of the matter contained,” &c., “says the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says,” &c.; and concludes thus: — “And this he is ready to verify; wherefore he, as before, prays judgment, if the plaintiff ought to have or maintain his aforesaid action thereof against him,” &c. No one of the fourteen pleas purports to answer the whole matter in either count.

The COURT, upon the plaintiff's motion, rejected (that is, refused to receive,) the first, second, seventh, ninth, eleventh, and thirteenth pleas, because they did not contain a justification of what they purported to justify.

Mr. Key, for the plaintiff, then moved for judgment, by *nil dicit*, upon each of the remaining pleas, as to so much as the plea did not cover; so as ultimately to obtain judgment, by *nil dicit*, for the whole matter charged in the declaration, although the whole matter should be specially justified by the pleas, when all are taken together; alleging that one plea cannot be aided by another; that is, that the defect of one plea cannot be supplied by another. *Currie & Whitney v. Henry*, 2 Johnson, 433, 437; *Sevey v. Blacklin*, 2 Mass. Rep. 543; *Grills v. Mannell*, Willes, Rep. 380; 1 Chitty, 543. And that although the defendant may plead several matters, as to different parts of the same count, they must all be pleaded in the same plea, and constitute but one plea. *Patcher v. Sprague*, 2 Johnson, 462–465; *Currie & Whitney v. Henry*, 2 Johnson, 437; Story's Pleading, 480, 481; 2 Har. Ent. 88; 2 Chitty, 421, 532, 535.

Mr. Key also contended that each plea is a mere nullity, and that the plaintiff is entitled to judgment, by *nil dicit*, upon the whole matter in the declaration. *Marsteller v. McLain*, 7 Cranch, 156.

Upon the motion for judgment, by *nil dicit*, as to so much of the matter in the declaration as is left unanswered by each respective plea,

CRANCH, C. J., delivered the opinion of the Court. The case of *Patcher v. Sprague*, from 2 Johnson, 462, is cited by the plaintiff, to show that “whatever is traversable in pleading, and which is not traversed, is admitted.” This is certainly true. 1 Chitty, 591. But in that case the replication, which was supposed to admit the fact not traversed, was a replication which purported to be an answer to the whole plea. That case, therefore, only shows that the doctrine applies to such pleas as pur-

port to answer the whole count; or, at least, such traversable matter as is within that part of the count which the plea purports to answer, when the plea purports to answer only a part of the count.

In the case of *Currie & Whitney v. Henry*, 2 Johnson, 437, SPENCER, J., in delivering the opinion of the Court, said:—"Pleas, pleaded under the leave of the Court, must contain in each of them sufficient matter in law to bar the plaintiff's action, and they cannot be made to depend on facts stated in other pleas."

This doctrine is stated as the reason for adjudging the defendant's third and fifth pleas in that case to be bad, on special demurrer. Each of those pleas purported to answer the whole count. The doctrine, therefore, so far as that case goes, is only applicable to pleas which profess to answer the whole count.

"When the body of a replication contains an answer to a part of a plea, the commencement should recite or specify that part intended to be answered; for should the commencement assume to answer the whole plea, but the body contain an answer only to part, the whole replication will be insufficient, and so *vice versa*." "In this case," says Mr. Chitty, "the form may run thus:—'And the said A. B., as to so much of the said plea of the said C. D. by him secondly above pleaded, as relates to the said supposed recognizance in the said plea mentioned, says that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says,' &c.; and the other part of the plea may commence as follows:—'And the said A. B., as to the residue of the said plea, saith, "*precludi non*," &c., "because," &c.

"On the other hand, when the matter to be replied is equally an answer to several pleas, it is proper, in order to avoid expense, to answer all the pleas in one replication." "In these cases, the commencement should apply to and profess to answer all the pleas. So where, to a plea of judgment outstanding, the plaintiff replied that each is fraudulent, he may conclude with one verification. 1 Chitty, 573.

"It is said that matter which is the ground of the suit, or upon which issue might be taken, cannot be protested, and that a protestation which is repugnant to, or inconsistent with the plea, is inartificial and improper. In these cases, the replication should either admit the part of the plea which is not disputed, by saying, 'true it is that,' &c., or should at once deny the matter intended to be tried; though the latter mode, as being the most concise, appears preferable; for whatever is not traversed is, in effect, admitted." 1 Chitty, 590.

“The qualities of a replication in a great measure resemble those of a plea ; which are, that it answers so much of the plea as it professes to answer ; and that if bad in part, it is bad for the whole ; and that it must be single. If it do not answer so much of the plea as it professes to answer, it will be a discontinuance.” 1 Chitty, 617 ; *Marsteller v. McLean*, 7 Cranch, 156 ; Com. Dig. Pleader, F. 4, W. 2 ; *Hancock v. Prowd*, 1 Saund. 338. See also 1 Chitty, 511, 512, 540, 592, 618 ; Co. Lit. 304 a ; *Coombe v. Talbot*, Salk. 218 ; *Curtis v. Bateman*, 1 Sid. 39 ; *Wilson v. Law*, Carth. 334 ; S. C. Skin. 554 ; *Middleton v. Cheeseman*, Yelv. 65 ; *Bray v. Fisher*, 2 Roll. Rep. 390 ; 1 Roll. Ab. 487, b. 43 ; 7 H. 6, 27 ; *Johnson v. Turner*, Yelv. 5 ; S. C. 1 Brownlow, 192 ; *Penton v. Robert*, 2 East, 88 ; 4 Co. 62 ; *Herlakenden's case*, Gilb. Hist. C. L. 155, 185 ; *Woodward v. Robinson*, 1 Str. 302 ; *Wilson v. Dodd*, 1 Roll. Rep. 176 ; *Wats v. King*, Cro. Jac. 353.

From all the cases which I have found, the rule seems to be, that where the plea professes to answer only a part of the actionable matter charged in the count, if the plaintiff, by his replication or demurrer, treats it as a plea to the whole matter, it is a discontinuance. But if the plaintiff, by his replication or demurrer, treat it as a plea to that part only which it purports to answer, it is no discontinuance ; provided that, at the time of replying or demurring, he take judgment, by *nil dicit*, for that part of the count which is unanswered by the plea.

Where several distinct and independent pleas are pleaded to different and separate parts of a count, the pleas are not double, and do not require the aid of the statute ; and if the plaintiff may reply or demur to each plea, and take judgment by default, or *nil dicit*, (which is the same thing,) as to all the matter not covered by each plea, in succession, so as ultimately to get judgment for all the matter contained in his declaration ; yet by the same process the defendant, if his pleas are all good, and the issues or demurrers be decided in his favor, will have made out a complete bar to the whole of the same matter ; and as the final judgment of the Court must be upon the whole record, that judgment must be for the defendant. *Tippet v. May*, 1 B. & P. 411 ; 8 Co. 120, b ; *Bonham's case*, 3 Co. 52, b ; *Ridgeway's case*, 8 Co. 133, b ; *Turner's case*, Hobart, 199, S. P.

Where several distinct and valid pleas in bar are, by the leave of the Court, under the statute, pleaded to the same count, and issues taken thereon, if one of the issues be found for the defendant, and the residue for the plaintiff, yet the judgment must be for the defendant. *Coke v. Sayer*, 2 Wils. 85. So if several distinct and valid pleas in bar be, by the leave of the Court,

pleaded to one and the same part of the count, and issue be taken thereon, and one of the issues be found for the defendant, the judgment, as to so much of the count as is answered by the plea, must be for the defendant, although the other issues be found for the plaintiff.

Where there are separate and distinct pleas to different parts of the count, and issues taken thereon, and some of the issues be found for the plaintiff and some for the defendant, several damages should be assessed, and judgment will be entered for the plaintiff as to the issues found for him; and for the defendant as to the issues found for him. And if, instead of taking issue, the plaintiff should demur to those pleas, (as he may safely do without fear of a discontinuance if he confine his prayer for judgment, on the demurrers to so much of his count as the plea professes to answer, and pray judgment by *nil dicit* for the residue,) and some of the demurrers should be decided in favor of the plaintiff, and some in favor of the defendant, the plaintiff would have judgment and a writ of inquiry of damages as to those decided in his favor, and the defendant would have judgment upon the others.

If it appear upon the whole record that any actionable part of the plaintiff's declaration remain unanswered by a sufficient plea, the plaintiff must have judgment for so much, if he shall have prayed judgment at the proper time, so as to avoid a discontinuance. But if it appear from the whole record that every actionable part of the declaration has been fully answered by a valid plea in bar, the truth of which has either been admitted in the pleadings, or found by the jury, the judgment must be for the defendant.

The form of pleading offered by the defendant, in the present case, seems to be fair, and more likely to result in a just judgment than if he had pleaded all the matters in one plea, unless in that plea he had tendered as many verifications as there are now pleas. And if he had done that, I see no substantial difference between that and the present manner of pleading. In that mode of pleading the defendant would come and say that the plaintiff his action aforesaid thereof against him ought not to have or maintain, because he says that as to so much, &c., he says, &c., and this he is ready to verify; and as to so much, &c., he says, &c., and this he is ready to verify; and so on, as to each particular set of words, and then conclude with a general prayer for judgment as to the whole count, instead of inserting, after every verification a special prayer for judgment as to the particular part of the count to which the matter thus offered to be verified, applies. The difference seems to be only a difference

of form; for in the mode of pleading which the plaintiff's counsel supposes to be right, each separate matter of defence pleaded to the distinct and different parts of the count, would, in effect, be a distinct and separate plea. It could derive no aid from the other matters of defence pleaded to a different part of the count. If it be not a good justification of the matter which it professes, in its introductory part, to justify, it must be the subject of a separate demurrer on the part of the plaintiff. (*Douglass v. Satterbee*, 11 John. 16.) If some of the several matters pleaded be good justifications of what they profess to justify, and others be not, the plaintiff must demur to the latter, and plead over to the others. If he were to demur to the whole as one plea, and one of the several matters pleaded should be a good justification of what it purports to justify, the demurrer must be overruled in the same manner as a demurrer to a whole declaration would be overruled if any one of the counts should be good. Com. Dig. Pleader, 2, 3; 1 Chitty, 643; *Powdick v. Lyon*, 11 East, 565; *Seddon v. Senate*, 13 East, 76, 77.

If none of the several matters pleaded to the respective parts of the count should be a good justification of what it purports to justify, perhaps one demurrer to the whole might be good, if it purported to be a demurrer to the separate matters pleaded; but then it would be good only *reddendo singula singulis*; and because it would, in effect, be equivalent to a separate demurrer to each matter of defence pleaded. The two modes of pleading differ only in form; and I can see no disadvantage to the plaintiff from the mode adopted by the defendant; nor any benefit which the plaintiff could derive from that which he seems to suppose to be the most correct.

If the difference be only in form, then, if by pleading in the form which the plaintiff contends for, he could not take judgment by *nil dicit*, so here where all the pleas are pleaded *uno flatu*, although they have not one common commencement and conclusion, I should think the plaintiff could not have judgment by default on any part of his count. If in replying to each plea he should take judgment, by default, as to all the matter in the count not covered by the plea, it would be only matter of form, to save a technical, or formal discontinuance. It is said that one plea cannot be aided by another. This is true, whether each plea be entire, or whether it purport to answer only a part. If an entire plea do not answer the whole count; or if a plea to a part of a count do not answer the whole part which it professes to answer, it is bad upon demurrer, and cannot derive aid from any other plea. But when a plea to a part of a count is an answer to such part, it needs no aid from any other plea; it is

sufficient for all that it professes to answer. So when the defendant, in what the plaintiff's counsel supposes to be one plea, pleads several distinct matters to several distinct parts of the count, each distinct matter pleaded must be sufficient in itself to answer what it professes to answer, and can derive no aid from another distinct matter pleaded to another distinct part of the count; so that the rule applies equally to both forms of pleading.

If a plea be a good justification of what it purports to justify, the plaintiff cannot treat it as a nullity, and take judgment by *nil dicit* for the whole matter contained in his declaration. He must demur or reply to the plea, and take judgment, by default, for what remains unanswered. If the plaintiff demur and pray judgment for the whole matter in his declaration, he admits that the defendant has answered to the whole matter; but answered badly; (*Taylor v. Cole*, 1 H. Bl. 562;) and as the plea professes to answer only a part of that matter, the plaintiff, by such demurrer, impliedly abandons all that part which the plea does not profess to answer; and therefore, and thereby, discontinues his suit for so much; and a discontinuance as to part (as before observed) is a discontinuance as to the whole. Every demurrer concludes with its appropriate prayer for judgment, and if it be to a particular count, or breach, it is qualified accordingly, (1 Chitty on Pleading, 644.) If it be to a plea in abatement, and conclude as if it were a plea in bar, it will be a discontinuance. In *Hughes v. Phillips*, Yelv. 38, the court said, "It is not all one *nil dicere ac insufficienter dicere*; for then upon every insufficient bar judgment should be upon *nil dicit*, which is not so." See also Story's Pleadings, 311, the form of a demurrer to a particular breach of covenant, and joinder; and in p. 303 & 322, a demurrer to several pleas. See also in 1 Harris's Entries, 90, the form of a judgment against the defendant who had neglected to plead as to part of a particular count, and where the plaintiff takes judgment by *nil dicit* as to that, in order to prevent a discontinuance. See also in 1 Har. Ent. 212, the form of a verdict in slander, part for the plaintiff and part for the defendant.

For these reasons the Court refused to give judgment by *nil dicit*, either as to the respective parts uncovered by each plea when taken separately; or to consider the several pleas as nullities, and to give judgment by default for the whole matter in the plaintiff's declaration.

Mr. Key, and Mr. Coxe, for the plaintiff, then pressed the Court to say whether they considered the several pleas as constituting one plea, or whether they considered them as several pleas.

But the COURT declined giving an answer, saying that they were under no obligation to do so.

CRANCH, C. J., however, said, that he considered them, (so far as they were not double, and went to constitute one defence to one count,) as constituting one plea, in the same sense as several matters, separately and distinctly pleaded and verified to separate and distinct causes of action in one count, would be considered as one plea, if they had only one common commencement and conclusion in the common form. That in all those pleas which go only to a part of the count, and do not need the aid of the statute respecting double pleading, the words, "by leave of the court here first had and obtained," were surplusage; and that whether the several matters were pleaded in one form or the other, there must, or at least may, be separate replications, or demurrers, to each matter.

The plaintiff then filed one special demurrer to all the pleas, in this form, viz.: "And the said Alexander Kerr, by F. S. Key, his attorney, saith that the said several pleas of the said Peter Force, and the matters therein contained, in manner and form as the same are above pleaded and set forth are not sufficient to prevent him, the said plaintiff, from having and maintaining his action aforesaid thereof against him, and that he, the said Alexander Kerr, is not bound by the law of the land to make answer thereunto; wherefore, for want of a sufficient plea in that behalf, the said Alexander Kerr, prays judgment and his damages by him sustained on occasion of the committing of the said grievances in the said declaration mentioned, to be adjudged to him.

"And for special causes of demurrer he states,

1. "That neither of the said pleas contains in itself, or professes to contain a sufficient answer to the whole declaration, or either count thereof, but proposes to answer, and does, in fact, answer to only a part thereof; and does not sufficiently traverse, deny, or confess and avoid, in any manner the said charges contained in the residue of the said declaration, or any part thereof.

2. "Because the said pleas do not, nor does either of them contain a sufficient answer to such part of the declaration of the plaintiff, as they respectively profess to answer.

3. "Because they are informal and defective, and have blanks.

4. "Because they profess to be double pleas under and by virtue of the statute allowing double pleading; whereas no one of them is, or contains, an entire answer to the whole declaration or any one count thereof, as in law it should and ought to do."

The defendant joined in demurrer specially (as in the case of *Johnson v. Turner*, Yelv. 5,) in this manner, or to this effect. "And the said defendant, as to the plaintiff's demurrer to the

defendant's third plea, says, that as to so much of the supposed libellous matter mentioned in the plaintiff's declaration, as is, in the introductory part of the said plea, mentioned, the plaintiff ought not to have or maintain his action aforesaid thereof against him the said defendant, because he says that his said plea, as to so much of the said supposed libellous matter as is in the said introductory part thereof mentioned, is good and sufficient in law to preclude the said plaintiff from having and maintaining his aforesaid action thereof against him, and this he is ready to verify; wherefore, for want of a sufficient replication to the said plea, the said defendant prays judgment, &c.," and so on as to the other pleas.

The first question, upon this demurrer is, whether the first set of words, in the first count, are actionable?

I think they are. In the words of Lord Holt, (in *Cropp v. Tinley*, 3 Salk. 226,) "they induce an ill opinion to be had of the plaintiff." They charge him with maliciously devising slanderous accusations against Mr. Adams; and with moral obliquity.

The third plea states positively the fact, that the plaintiff, with intent to injure and defame Mr. Adams, did devise and publish slanderous accusations against him, charging him with unfair, fraudulent, and dishonest conduct in endeavoring to get rid of a just and legal responsibility which he had incurred as indorser of the promissory note in the declaration mentioned.

Moral obliquity must be proved by some act done *malâ fide*. Deceit and falsehood include *mala fides*. To charge the plaintiff with deceit and falsehood, is to charge him with moral obliquity. The plea charges that the plaintiff, by a material alteration of a note indorsed by Mr. Adams, deceitfully and falsely made it to appear that Mr. Adams knew, at the time of indorsing the note, that it was for nine months' rent, whereas he intended to indorse a note for only six months' rent. That act, therefore, must have been an act of moral obliquity.

Without inquiring, therefore, whether the other act charged in this plea be evidence of moral obliquity, I think it quite as clear that the plea is good, as that the words are actionable. In the case of *Riggs v. Denniston*, 3 Johnson's Cases, 198, Judge Kent, in delivering the opinion of the Court, after stating that the libel meant to impute to the plaintiff a voluntary offer of himself as a witness to divulge his client's secrets, says, that the plea in justification was objected to because it is not averred that the plaintiff voluntarily offered himself; and whether voluntarily or not was traversable. "A voluntary offer," says the Judge, "is here to be understood; and the meaning of the allega-

tion is certain to a common intent, which is well enough in a plea. The plaintiff might have traversed the fact, and the defendant would have been bound, on the trial, to have shown the offer to be voluntary, for that is the gist of this part of the libel, and the intendment of the plea. The allegation in the plea can have no other reasonable intendment. It is the language of the libel itself, which is admitted to mean a voluntary offer; and according to the just observation of Lord C. J. DeGrey, Cowp. 687, a man cannot defame in one sense and justify in another."

In *Rex v. Horne*, Cowp. 682, C. J. DeGrey says that certainty to a common intent is sufficient in defence. In *The King v. Lyme Regis*, Doug. 158, Buller, J., says it is sufficient in a plea in bar; and in Co. Lit. 303 a, Lord Coke says, "it is sufficient in bar, which is to defend the party or to excuse him." See also *Long's case*, 5 Co. 121 a; Com. Dig. tit. Pleader, c. 17; Heath's Maxims, 3; *Spencer v. Southwick*, 9 Johnson, 314.

But if a higher degree of certainty be required, viz., certainty to a certain intent in general, I think the plea has that certainty. In *The King v. Lyme Regis*, Doug. 158, Judge Buller says, "Certainty to a certain intent in general" "means what, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear; and is what is required in declarations, replications, and indictments, in the charge or accusation, and in returns to writs of *mandamus*." "The charge must contain such a description of the crime, &c., that, without intending any thing but what appears, the defendant may know what he is to answer, and what is intended to be proved; in order that the jury may be warranted in their verdict, and the Court in the judgment they are to give." *Rex v. Horne*, Cowp. 682; 1 Chitty, 237.

It is true, that "it is a maxim in pleading that every thing should be taken most strongly against the party pleading; or, rather, that if the words be equivocal, they shall be taken most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible. But the language of the pleading is to have a reasonable intendment and construction; and, where an expression is capable of different meanings, that shall be taken which will support the declaration, &c., and not the other which would defeat it." *Wyat v. Aland*, 1 Salk. 325; *The King v. Stephens et al.*, 5 East, 257; *Amherst v. Skinner*, 12 East, 270; *Woolnoth v. Meadows*, 5 East, 463.

The imputation in the libel is, that the plaintiff maliciously devised slanderous accusations against Mr. Adams, and that the plaintiff was guilty of moral obliquity.

The fourth plea, also, I think is good, for the same reasons for which I think the third is good. It contains a good justification of the charge of moral obliquity, which is all it professes to justify.

The fifth plea is to the second class of words in the first count; beginning "It is observable," and ending "for him to explain." These words charge Mr. Kerr with making certain alterations in the warrant of distress, which, in themselves, appear to be innocent, but which are said in the libel to be "not altogether immaterial to the consciousness of Mr. Kerr," thereby insinuating some improper motive not explained by innuendo. They also charge him, in general terms, with "other alterations of other documents," which it is said "it will not, perhaps, be so easy for him to explain;" thereby also insinuating improper motives not explained by innuendo.

I am very doubtful whether these words, without an innuendo explaining the offensive meaning of which the plaintiff complains, are actionable. *Starkie*, 75; *Rex v. Horne*, Cowp. 683; *Woolnoth v. Meadows*, 5 East, 463. If they are actionable, I think the justification sufficient.

The sixth plea is to so much of the last-mentioned class of words as charges the plaintiff with "other alterations." It reiterates that part of the third plea which relates to the alteration of Mrs. Moulton's note and Mr. Moulder's check. I think it is a good justification of what it purports to justify.

The eighth plea is to the third class of words in the first count; beginning "This letter," and ending "indignation at the bank;" comprehending that part of the supposed libel which charges the plaintiff with deceiving Mr. Adams, by means of the letter to Mrs. Adams.

This plea affirms the literal truth of the words, and adds the following averment:—"And the defendant in fact says that the plaintiff, by means of the said letter and note, practised a fraud and deception upon the said J. Q. Adams, by drawing him in to indorse a note for three months' rent more than was included in the warrant of distress, contrary to the known intent, purpose, and object of the indorsement so made by him, the said J. Q. Adams."

I think this plea is sufficient, as it avers a direct fraud and deception practised by the plaintiff upon Mr. Adams. This could not be, unless it were done with a fraudulent intent. The averment is certain to a certain intent in general. To require an additional averment, that the fraud and deception were practised with a fraudulent intent, would be almost tautology; and would be a requisition of certainty to a certain intent in every

particular, which, if ever required, is only necessary in estoppels.

The tenth plea is to the fourth class of words in the first count; beginning "We now come," and ending "the terms and conditions of the note." These words are capable of the meaning attributed to them by the plaintiff in his declaration. They may amount to a charge of forgery. The question then is, whether the plea charges the plaintiff with that offence, in terms so precise as to amount to certainty to a certain intent in general, in the sense in which this phrase is used in juridical language.

In *Rex v. Lyme Regis*, Doug. 158, Buller, J., in speaking of that kind of certainty, says:—"I take it to mean what, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear."

In *The King v. Stephens and Agnew*, 5 East, 257, Lord Ellenborough says:—"But if it (the matter pleaded,) be clearly capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party, framing the criminal charge, must be understood to have used it if he intended his charge should be consistent with itself; and this, at least, we may suppose him to have intended." And in page 259 he says:—"Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed, than such as are in ordinary use; or that in indictments, or other pleadings, a different sense is to be put upon them from what they bear in ordinary acceptation." "If the sense be clear, nice exceptions ought not to be regarded."

These cases show a relaxation, in some degree, of the severity of the rule as laid down in 2 Hawk. c. 25, § 60, "That in an indictment, nothing material should be taken by intendment or implication." Indeed, Hawkins himself, after stating several cases in which exceptions to indictments have been overruled, says, in § 61:—"But I cannot find any general rule, whereby it may be known in what cases an exception of this kind shall be taken to be so over nice that the Court will not regard it. All that I shall add on this head is this, that as, on the one hand, the law will not suffer any man to be condemned of any crime, whereof the jury has not expressly found him guilty, by any argument or implication from what they have so found; so, on the other hand, it will not suffer a criminal to escape on so

trifling an exception, which it would be absurd and ridiculous to take notice of; for *nimia subtilitas in jure reprobatur*." "But the judgment hereof cannot but be, in a great measure, left to the discretion of the judges, who, from the circumstances of each particular case, the comparison of precedents, and the plain sense of the thing, seem always to have endeavored to go within these rules as nearly as possible."

In *The King v. Aylett*, 1 T. R. 69, Lord Mansfield said:—"It is necessary, in every crime, that the indictment charge it with certainty and precision, to be understood by everybody, alleging all the requisites which constitute the offence; but every crime stands on its own circumstances, and has peculiar rules." 1 Chitty, *Crim. Law*, 174. "It has been holden that the statement, that the defendant 'knowingly' committed any act, is a sufficient averment of knowledge." 2 Str. 904, n. 1; 1 Chitty, *Crim. Law*, 241.

In *Rex v. Lawley*, 2 Strange, 904, an averment that the defendant, knowing that C. had been indicted for forgery, did so and so, is a sufficient averment that C. had been indicted; and an averment that the defendant, knowing Sir T. A. to have conspired the death of the king, is a sufficient averment that Sir T. A. did so conspire. See also *The King v. Fuller*, 1 B. & P. 186, that a charge of endeavoring to seduce a soldier is equivalent to an averment that he knew he was a soldier.

In *Rex v. Woodfall*, 5 Burr. 2667, Lord Mansfield said:—"That where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent." And in *Rex v. Horne*, Cowp. 679, he said:—"An indictment or information must charge what in law constitutes a crime, with such certainty as must be proved; but that certainty may arise from a necessary inference, in the manner settled in *The King v. Lawley*, in Strange." 2 Str. 904.

All the certainty required is, that the plea shall contain a clear and distinct statement of the facts which constitute the ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the Court who are to give judgment. *Rex v. Horne*, Cowp. 682.

The plaintiff avers, that the defendant meant by these words to charge him with forgery. The Court has decided that they are capable of that meaning, and that the jury might find that the plaintiff used them in that sense. The defendant, therefore,

must justify them in that sense, by showing facts, either by direct averment or necessary inference, which amount in law to forgery.

The facts averred are, that the plaintiff did falsely, and fraudulently, and unlawfully alter the note, so as materially to change the terms and conditions thereof. The act thus stated is an act unlawful in itself; and, therefore, according to the doctrine of Lord Mansfield in *Rex v. Woodfall*, 5 Burr. 2667, the law implies a criminal intent. If the act be a crime, can it be any other crime than forgery?

If a man, under the circumstances stated in this plea, falsely, fraudulently, and unlawfully alter a note, so as materially to change its terms, the criminal intent is necessarily inferred, and he is in law guilty of forgery. The act could not be fraudulently done without a fraudulent intent.

Hawkins, 1 P. C. b. 1, c. 21, § 1, defines forgery, at common law, to be "an offence in falsely and fraudulently making or altering any matter of record, or any other authentic matter of a public nature." And in *Rex v. Ward*, 2 Lord Raym. 1466, the same definition is extended to any writing, by the false making, or altering of which a person may be prejudiced; and from the same chapter in Hawkins, § 4, it appears that if the holder of a note alter it to a less sum, "it is forgery, if, by the circumstances of the case, it should appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person." "It is also holden that such an alteration, even without these circumstances, is a misdemeanor, though it be no forgery."

At common law it is sufficient, in an indictment for forgery, to say forged and counterfeited, without adding "falsely," which the term "forged" sufficiently implies; nor is it necessary to add the term "unlawfully," since the offence is manifestly illegal. 2 Roll. Ab. 82, p. 4; 3 Chitty, Cr. Law, 1042.

"The very essence of forgery is an intent to defraud." 3 Chitty, Cr. Law, 1039. "An intent to defraud (as we have seen it is essential to the offence,) must be laid in the indictment, and strictly proved in evidence." *Id.* 1042. But it is in no case necessary that an actual injury should result from the offence. *Rex v. Ward*, 2 Lord Raym. 1461; S. C. 2 Str. 747; *Rex v. Crooke*, 2 Str. 901; *Rex v. Goate*, 2 Lord Raym. 737.

In Archbold's Crim. Pleading, 189, it is said:—"The intent to defraud is described as an ingredient of the offence, in all the statutes upon the subject of forgery, and consequently must be charged in the indictment." And again, in p. 205, Mr. Archbold says:—"The forging and counterfeiting of any writing,

with a fraudulent intent whereby another may be prejudiced, is a misdemeanor at common law, in all cases where it has not been made felony by statute; thus counterfeiting a letter of credit, 1 Str. 12; a bill of lading, 1 Salk. 342; a debtor's discharge, 2 E. Pl. c. 862; and the like, are forgeries at common law." And this seems to be the result of all the books and cases upon the subject; so that this tenth plea avers all the facts which constitute the crime of forgery at common law.

The *dictum* of Mr. Starkie, (on Slander, p. 340,) "that the same degree of certainty and precision are required in this plea, as are requisite in an indictment or information," is not supported by the cases which he cites to confirm it. In the case of *Wyld v. Cookman*, cited from Cro. El. 492, the words were, "Thou wast forsworn in such a leet on such a day." "The plea was that the plaintiff was sworn, with others, before the Steward, to present, &c.; and that they presented such a ditch not scowered, *ad nocumentum*, &c., which was false, and so justifies; and it was thereupon demurred; and now moved that this was not any plea, because it is not said that they knew it, of their proper notice, to be false; otherwise it is not perjury; for they make their presentment upon evidence, which, if they believe, and present falsely accordingly, it is not any perjury. Gawdy and Fenner — It is properly and commonly intended that they should present fault of their own knowledge; and if they presented upon evidence, the plaintiff ought to show it by replication. Popham — But a man may not justify by intendment; but it ought to be precisely alleged." The case went off upon another point, viz., that the ditch was not within the leet, so that the case is of no authority; and, as far as it goes, there were two judges to one against the point which it is cited to support.

The only other case cited by Mr. Starkie upon this point, is from Brooke's Abridgment, Action sur case, pl. 3; which, translated, is in these words, viz.: "Note action on the case for calling the plaintiff 'thief,' and that he stole two sheep of I. S. The defendant says that the plaintiff did steal the sheep, wherefore he called him 'thief,' as well he might; and good *per cur.* without expressing the value; for if they were not worth 12*d.* and so only petit larceny, and not felony of death, yet this is felony in its nature; and the same law, 28 H. 8. between Austin and Thomas Lewis, for calling him false and perjured, he justified for this, that the plaintiff was perjured in the star-chamber in such a matter, &c.; and good plea *per cur.* 27 H. 8, 22."

In an indictment, it would have been necessary to set forth the value of the sheep; but the Court held it not necessary in a

plea of justification; so that the decision is directly contrary to the *dictum* of Mr. Starkie, if that dictum is to be understood to mean that every thing must be averred in a plea in justification which it would be necessary to aver in an indictment for the same offence. But I do not understand Mr. Starkie as carrying the doctrine to that extent. I think he only meant to say, that where the libel charges the plaintiff with a crime by its technical name, (murder, for instance,) the plea must charge the fact with as much certainty and precision as in an indictment. But even to this extent his authorities fail him.

But, if the offence must be stated with as much precision in a plea as in an indictment, it is holden in 1 Curwood's Hawk. P. C. B. 1, c. 21, § 27, that "in an indictment for forgery it is sufficient to aver a general intent to defraud, without setting out the particular manner by which the fraud was to be effected; for it is no answer to the charge of forgery, to say that there was no special intent to defraud any particular person; and, if a particular person be named, a description of him to a common intent, is all that is required." *Powell's case*, Cases C. L. 72, 193, *notis*; *Lavell's case*, Cases C. L. 213; *Palmer's case*, Cases C. L. 295.

Chitty (Cr. Law, vol. iii, p. 1036) says: "And, indeed, it seems that it is not necessary to constitute forgery, that there should be an intent to defraud any particular person; and a general intent to defraud will suffice." And in *Tatlock v. Harris*, 3 T. R. 176, it is said, that "if a person does an act, the probable consequence of which is to defraud, that constitutes a fraudulent intent in the eye of the law." In p. 342, Mr. Starkie says, "The matter alleged in justification, to be true, must, in every respect, correspond with the imputation complained of in the declaration." Here the imputation is, that the plaintiff committed forgery. The plea charges all the facts which constitute forgery. The matter alleged in justification, therefore, corresponds, in every respect, with the imputation.

Upon the whole, I am of opinion that the tenth plea, charging that the plaintiff did falsely, fraudulently, and unlawfully, alter the note so as materially to change the terms and conditions thereof, is a good plea in justification of the charge of forgery, without any further averment of a fraudulent intent, or of an intention to injure any person in particular.

I think the twelfth plea good, for the like reason. It is to the first set of words in the second count, which are these. "He altered the note signed by Mrs. Moulton, and indorsed by Mr. Adams, falsely and fraudulently, so as to change the terms and conditions thereof and therein committed forgery. He falsely

made and forged an alteration in the note signed by Mrs. Moulton, and indorsed by Mr. Adams, so as to change the terms and conditions of the note."

The plea avers that the plaintiff did falsely and fraudulently forge and make an alteration in the note so as to change its terms and conditions in this, to wit: (&c., as in the tenth plea). I think it avers all the facts necessary to constitute the charge of forgery.

The fourteenth plea is to the second set of words in the second count, which is the same as the fourth set in the first count, to which the tenth plea is an answer. This fourteenth plea is exactly like the tenth, and is good for the same reasons. I am, therefore, of opinion that judgment should be given for the defendant upon the demurrer to all the pleas.

THRUSTON, J., concurred in this judgment.

MORSELL, J., was of opinion that the tenth and fourteenth pleas ought to have averred an intent to injure Mr. Adams.

The plaintiff, then, by leave of the Court, withdrew his demurrer to all the pleas, except the original plea of justification, and joined issue upon the facts stated in the fourteenth plea in justification, which came on for trial on the 9th of January, 1828, and on the 15th the jury retired to consider of their verdict, and were out until the 18th, when, not having agreed, and the Court being about to close the session, the parties agreed to withdraw a juror, and continue the cause to the next term, when it was again continued to December Term, 1828, when it was compromised by the parties; the defendant confessing judgment for one cent damages, and admitting that the plaintiff in the alteration of the note, and the other acts alluded to in the libel, was not actuated by any criminal intent, or by an intention to defraud any person.

Some instructions and opinions were given during the trial, and bills of exception were taken, but they are not deemed worth reporting.

THE BANK OF THE U. S. v. THOMAS CORCORAN.

Notice left at the shop of the indorser's son, is not sufficient to charge him, although the shop was in a room of the house in which the indorser resided; the entrance into the shop being separate from that into the dwelling-house; the indorser having no concern in his son's business, and, being postmaster, and having a separate office in which he transacted his public and private business, and the son having a separate dwelling-house.

An agreement by the indorser not to take advantage of the statute of limitations, and to authorize an attorney to agree to docket a suit upon the note, is not evidence from which the jury can infer that the indorser received due notice.

ASSUMPSIT against the defendant as indorser of Daniel Reintzel's note, for \$3,700.

The notice for the defendant was left at the shop of the defendant's son, kept in the dwelling-house of the defendant, but having a separate entrance, and unconnected with the part occupied by the defendant.

The defendant had no concern with the shop, and the son had a separate dwelling-house. The defendant was postmaster, and kept an office in which he transacted his private business as well as his public. The notary had been in the habit of leaving notices for the defendant at the shop of the defendant's son; but there was no evidence that the defendant had authorized, or acquiesced in, such notices so to be left.

The COURT (THRUSTON, J. *contrà*.) instructed the jury that such notice, so left, was not sufficient to charge the defendant.

Mr. Key, for the plaintiff, then prayed the Court to instruct the jury in effect, that if they should be satisfied by the evidence that notice had been duly received by the defendant, although it was so left, the notice was sufficient; and that the two papers (hereafter mentioned), were evidence from which the jury might infer such notice. The papers were, first, an agreement not to take advantage of the statute of limitations; and, second, a promise to authorize counsel to docket a suit upon the note.

But the COURT (THRUSTON, J. *contrà*.) refused to give the instruction, because they thought the papers did not warrant such an inference.

Bills of exception were taken, and upon the writ of error, the judgment was affirmed by the Supreme Court of the United States upon both points. 2 Peters, 121.



JAMES BARBOUR, Secretary of War, for the use of Roland Clapp,
v. GILBERT C. RUSSELL.

Bail will not to be required in an action upon a bond with a collateral condition.

DEBT for \$120,000, the penalty of a bond given by Nimrod Farrow, and the defendant, one of his sureties, under the act of Congress of the 3d of March, 1825, "for the relief of Nimrod Farrow and Richard Harris," with condition that Farrow should appropriate the proceeds of the property in the act mentioned, towards the payment of the debts contracted by Farrow and Harris, in the erection of a fortification on Dauphin Island.

The declaration alleged the breach of the condition to be

Goldsborough v. Baker.

in the non-payment of \$6000 due by Farrow and Harris to one Roland Clapp, for supplies, &c., in and about the erection of the said fortification.

Upon the return of the writ, Mr. Jones moved for leave to enter his appearance for the defendant without special bail. 1 Petersdorff, 405, 411; *Edwards v. Williams*, 5 Taunt. 247; *Bosanquet v. Filles*, 4 M. & S. 330.

Mr. R. S. Coxe, for the plaintiff, objected and produced the affidavit of the said Roland Clapp, stating that the defendant, Russell, is indebted to him in \$6000 due on a bond dated 19th April, 1825, entered into by the defendant to James Barbour, Secretary of War, "for the use and benefit of this deponent and others in the penal sum of \$120,000, conditioned for the performance of divers covenants, and for the payment of the said sum of \$6000;" and cited *Hobson v. Campbell*, 1 H. Bl. 245.

The name of the said Roland Clapp is not mentioned in the bond or its condition, nor is any sum of money therein stated to be due to him.

The COURT (THRUSTON, J. absent,) permitted the defendant to appear without special bail.

HOWES GOLDSBOROUGH v. JOHN W. BAKER.

In a covenant by the defendant, dated January 13, 1824, to deliver 5000 perches of building stone at a certain place, by a certain day, at \$2 a perch, to be paid as the plaintiff should receive money from the Government, and 1000 perches of *Rip-Rap* stone, by a certain day, and 2000 perches, if plaintiff should give defendant notice before the 1st of May, at \$1.80 a perch, and that defendant would not ship any stone on his account from the District of Columbia before the 1st November, then next, and which covenant concludes with these words: "In witness whereof we bind ourselves to pay, each to the other, in case of failure by either of us on this contract, the sum of \$2000 in case the said stone shall not be delivered, or, when delivered, paid for as above." This sum of \$2000 is a penalty and not liquidated damages; and the contingent quantity of 2000 perches of *Rip-Rap* stone, includes the 1000 perches mentioned in the same sentence.

Declarations of the plaintiff, after the date of the contract, may be given in evidence by the defendant to mitigate the damages, as well as to contradict the plaintiff's evidence.

COVENANT upon an agreement, dated January 13, 1824, under seal, by which the defendant contracted with the plaintiff to deliver 5000 perches of building stone at Fortress Munroe at a place called "The Rip-Raps" by the 1st of November, 1824, at \$2 a perch, to be paid as fast as money should be received by the plaintiff from the Government therefor, and also 1000 perches of *Rip-Rap* stone, and 2000 perches of *Rip-Rap* stone, if the plaintiff should require it and give notice to the defendant before the 1st of May, for which the plaintiff agreed to pay \$1.80 a

perch, and the defendant covenanted that he would not ship any stone on his account from the District of Columbia before the 1st of November then next. And the covenant concluded thus: "In witness whereof we bind ourselves to pay, each to the other, in case of failure by either of us on this contract, the sum of \$2000, in case the said stone shall not be delivered, or when delivered, paid for as above." The breach alleged was on the non-delivery of the 5000 perches of building stone, and the 1000 perches and the 2000 perches of Rip-Rap stone.

Upon the trial the plaintiff claimed the \$2000 (reserved in the covenant) as stipulated damages.

But the COURT, (*nem. con.*) stopped *Mr. Key* and *Mr. Redin* for the defendant and decided, and so instructed the jury, that the said sum of \$2000 was to be considered as a penalty, and not as stated damages; and that the jury, in the assessment of damages, ought to be guided, not by the said sum as stated damages, but the actual damage proved by the plaintiff to have been sustained by him from the breach of the said contract.

And the plaintiff, having given notice, before the 1st of May, 1824, to the defendant to deliver the 2000 perches of Rip-Rap stone mentioned in the contract, claimed damages to be assessed by the jury, as for 3000 perches of such stone, after deducting the quantity actually delivered.

But the COURT (*nem. con.*) decided, and so instructed the jury that the said 2000 perches of Rip-Rap stone included the preceding 1000 perches, and constituted the whole quantity of such stone which the defendant had stipulated, by the said contract, to deliver.

The defendant then offered to prove in mitigation of damages, and in contradiction of the plaintiff's evidence, that late in September or early in October, 1824, he requested of the plaintiff an extension of the time for the delivery of the stone; which the plaintiff refused, saying that he had prepared himself to deliver the balance of stone, in case of the defendant's failure; to the admission of which evidence the plaintiff objected, but the COURT, (*MORSELL, J., contra*,) admitted the same.

Verdict for the plaintiff, \$100. Bills of exception were taken, but no writ of error was issued.

Mr. Lear and *Mr. Jones*, for the plaintiff, cited *Roy v. Beaufort*, 2 Atk. 193; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Ponsonby v. Adams*, 2 Bro. P. C. 431; *Sandiford v. Tayloe*, 7 Wheat. 18; *Astley v. Weldon*, 2 B. & P. 346; *Sloman v. Walter*, 1 Bro. C. C. 418; *Cotterel v. Hooke*, Doug. 97; *Wilbeam v. Ashton*, 1 Camp. 78; *Fletcher v. Dyche*, 2 T. R. 32; 1 Holt, N. P. 20, 43.

C. T. COOTE & RAPHAEL JONES, for the use of Raphael Jones, v.
BANK OF THE UNITED STATES.

Money deposited in a bank in the name of a firm, cannot be drawn out by the individual check of one of the firm in his own name only; and if the bank pay such a check out of the joint funds, it can only justify itself by showing that the money thus drawn was applied to the use of the firm.

If the defendant call for the books of the plaintiff, and, upon their being produced, inspect them, the plaintiff may read them in evidence.

It is no excuse for the bank in paying out the joint funds upon the individual check, that the individual partner, who drew the check, told the bank-officer that it was drawn on the joint account, and drawn in his individual name by mistake, and directed him to pay it and any others of the like kind which he might draw, out of the joint funds.

The partner thus drawing, and who is one of the plaintiffs, is not a competent witness for the defendants.

ACTION for money had and received by the defendants for the use of the plaintiffs, who were joint partners under the name of Clement T. Coote & Co.

The bank had paid out the funds of the firm upon the individual check of C. T. Coote, who had an account open in the bank in his own name, but had no funds.

The firm also had an account and funds to their credit in the defendants' bank.

Mr. Jones, for the plaintiffs, offered evidence to prove that the money was thus drawn out by *Mr. Coote*, for his individual use, and not for partnership purposes.

Mr. Key, for the defendant, objected; and contended that every partner has a right to draw out the funds of the firm in his own name; and that it is immaterial to the bank to what purpose he applies them.

The COURT, (THRUSTON, J., absent,) admitted the evidence; and CRANCH, C. J., said the bank could only justify themselves in paying out the joint funds on the individual check, by showing that the funds, thus drawn, were applied to the use of the firm.

Mr. Jones offered to read in evidence for the plaintiffs the books of the plaintiffs, which had been called for and inspected by the defendants.

Mr. Key, for the defendants, objected; but, on recurring to Phillips's Law of Evidence, p. 338, &c., he waived his objection. The leger only had been inspected by the defendants' counsel, and that only was read by the plaintiffs' counsel. The other books called for by the defendants and produced by the plaintiffs, but not inspected by the defendants, were not read. *Mr. Jones* cited *Kenny v. Clarkson*, 1 Johns. 385.

Meade v. Keane.

Mr. Key, for the defendants, prayed the Court to instruct the jury, in effect, that if they should believe from the evidence that C. T. Coote had no funds in the bank when he drew the check, and that he informed the bank-officer that he drew the check and might thereafter draw others, on account of the partnership, in his own name, and directed him to pay the same out of the funds standing in the bank to the credit of the company as in such cases he should draw them on the partnership account, then the plaintiffs are not entitled to recover, unless they can satisfy the jury that the said Coote did draw the said check on his own account, and that the defendants or their officers knew or had sufficient cause to know that he so drew it.

But the COURT refused to give the instruction, because the check, on its face purports to be for the private concern, and the bank is, *primâ facie*, to be presumed to have had notice that it was for his private use; which presumption is not rebutted by the fact that Mr. Coote told the officer that he might thereafter draw checks in his own name which would be on joint concern; for the jury were, by the prayer, still left to infer, or not, that the check was for a joint purpose; or that the bank, at the time of paying the check, believed it was for the joint concern; and unless the jury should infer one or the other, the presumption would remain that the bank, at the time of paying the check, had notice that it was drawn for the individual use of Mr. Coote.

The defendants' counsel then offered to examine Mr. Coote himself, one of the plaintiffs, as a witness. The partnership was dissolved and all the funds transferred to Mr. Jones; mutual releases given of all demands, containing a covenant on the part of Mr. Coote to indemnify Mr. Jones from "all debts, sums of money, and agreements" entered into by Coote on his own account, for which the firm might, in any manner, stand pledged.

The COURT, however, rejected him as a witness because, if he sustained the issue on the part of the defendants, he relieved himself from their action against him, for the amount of his individual checks, which had been by the defendants charged to the joint account; while he is protected by the release, from the action of Jones.

At May Term, 1827, there was a verdict for the plaintiffs, \$500. Bills of exception were taken, but no writ of error.

RICHARD W. MEADE v. RICHARD R. KEANE.

If a witness for the plaintiff testifies that on a certain day he paid to the defendant a

Kidwell v. Masterson.

certain sum of money, and took his receipt, the plaintiff is not bound to produce the receipt on the trial.

If a *dedimus* issue to take depositions in a cause in which Richard M. Meade is plaintiff, whereas the name of the plaintiff was Richard W. Meade, and the commissioners certify that they took the depositions to be read in a cause in which Richard W. Meade was plaintiff, the depositions are admissible, notwithstanding the clerical error in writing an M. for a W. in the commission.

In taking a deposition under a commission it is not necessary that it should be written by the commissioners, or by their clerk, or by the witness.

ASSUMPSIT, for money had and received.

Mr. C. C. Lee, for the plaintiff, offered to read a part of a deposition, in which the witness testified that he paid a certain sum of money on a certain day, and took his receipt.

Mr. Key, for the defendant, objected, unless the plaintiff should produce the receipt.

But the COURT, (THRUSTON, J., *contrà*,) overruled the objection.

Mr. Key, then objected to the deposition, because the commission, under which it was taken, purported to be issued in a cause in which Richard M. Meade (not Richard W. Meade, which was the name of the plaintiff,) was plaintiff; although the commissioners certified that they took the deposition to be read in a cause in which Richard W. Meade was plaintiff.

But the COURT, (THRUSTON, J., *contrà*,) overruled this objection also; saying it was a mere clerical error; and that a commission is not an *ex parte* proceeding, as is the case where a deposition is taken under the Act of Congress, and the parties are not bound to the same strictness.

Mr. Key also objected that the commissioners had not certified that the deposition was taken down by the commissioners or their clerk, or by the witness himself.

But the COURT, (THRUSTON, J., *contrà*,) overruled this objection also.

Affirmed by the Supreme Court, 3 Peters, 1.

 KIDWELL v. MASTERSON.

A court of equity will at any time, upon motion and notice, dissolve an injunction, for want of equity in the bill.

A court of equity will not grant relief upon grounds of which the complainant might have availed himself at law.

Before a court of equity will stay a judgment at law, it must see clearly that the complainant has equity on his side.

BILL IN EQUITY to stay a judgment at law rendered upon an award of arbitrators.

An injunction had been granted by one of the judges in vaca-

tion; and *Mr. Marbury*, having given notice to the complainant, now moved to dissolve the injunction, for want of equity in the bill.

The bill after stating the original merits of the case at law, alleges that the arbitrators promised the complainant that they would not proceed to make an award, and would return the papers; notwithstanding which they did proceed, and made an award, which was returned to the Court; of which he was informed by his solicitor, who filed exceptions, which were overruled, and judgment was rendered upon the award. That he was and still is unable to prove that promise, unless by the arbitrators themselves. It also alleges other improper conduct on the part of the arbitrators.

Mr. Marbury, for the defendant, contended that this is not a ground of equitable jurisdiction, because the court of law which rendered the judgment upon the award was fully authorized by the act of Maryland of October 1778, c. 21, §§ 8, 9, to give relief in such a case upon the return of the award. The words of the act are that, "if it shall appear to the justices of the court to which any such award shall be returned," "that the same was obtained by fraud or malpractice in, or by surprise, imposition, or deception of, the arbitrators, or without due notice to the parties, or their attorney or attorneys, the said court may set aside such award, and refuse giving judgment thereon." The bill does not state any reason why the complainant did not apply to the court of law for relief.

Mr. Swann, for the complainant, contended that the arbitrators did not do justice to Kidwell, and went into the merits of the original dispute between the parties, and contended that fraud, malpractice, surprise, imposition, and deception, are clear and original grounds for relief in equity, and that their being also made by statute grounds of relief by the court of law does not oust the court of equity of its original jurisdiction; and equity will give relief if the arbitrators have mistaken either the fact or the law. *Corneforth v. Geer*, 2 Vern. 705; *Montefiori v. Montefiori*, 1 W. Bl. 364; *Anon.* 3 Atk. 644; *Morgan v. Mather*, 2 Ves. Jun. 15; *Tillotson v. Cheetham*, 2 Johns. 63; *Young v. Walter*, 9 Ves. 364.

Mr. Marbury, in reply, cited *Featherstone v. Cooper*, 9 Ves. 67. See also *Kampshire v. Young*, 2 Atk. 155.

CRANCH, C. J., delivered the opinion of the Court.

If the arbitrators promised the complainant that they would not proceed to make an award, and did afterwards proceed to make an award without notice to the complainant; such an award was obtained by malpractice in the arbitrators, and the

court of law might have set it aside. No sufficient reason is shown in the bill why the complainant did not apply to that court to do so. He suggests as a reason, that he could not prove the promise, except by the arbitrators themselves. But their testimony was as easily obtained in a court of law as in a court of equity.

No principle is better settled than that, if a party has a full remedy at law, he has none in equity.

In the case of *Young v. Walter*, 9 Ves. 364, the point decided was, that if the parties refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the court will set that right; but if a distinct question of law, and nothing else, is referred, and the parties choose to say they will not take the decision of the court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree?

But in *Featherstone v. Cooper*, 9 Ves. 67, where the objections to the award were within the jurisdiction of the court of law in which the reference was made, the Lord Chancellor said,—“An application might have been made to the Court of King’s Bench at any time for the reasons in the bill; for there is no reason in the bill upon which the jurisdiction of that court (call it legal or equitable) would not as much attach as the jurisdiction of this court.” “But it is material whether the case is brought here upon those grounds, the discussion of which is peculiar to courts of equity, or additional to those which might have been stated to the court of law. Without saying this jurisdiction is shut out, the circumstance of not applying to the court of law is a fair ground for this court to deal less actively for a person who could have relieved himself at law, than where the bill brings forward additional grounds, or grounds peculiar to this court.”

The bill states that the award was made by the arbitrators, “under a mistaken impression of the facts as well as the law,” but does not set forth in what particulars; so that the Court cannot see whether those facts, or that law, mistaken by the arbitrators, were material to the cause. Before the court of equity will stay the judgment at law, it must see clearly that the complainant has equity on his side. This allegation being the only one in the bill which would afford a ground of relief peculiar to a court of equity, and not being stated with so much certainty as to enable the Court to see that the mistake was material, the Court must dissolve the injunction.

Injunction dissolved, March 28, 1827.

 Negro William v. Van Zandt & Estes.

WILLIAM SMITH v. ZECHARIAH HAZEL.

In an action upon a replevin bond the defendant may, in mitigation of damages, give evidence of title in himself of the property replevied. *Quære?*

DEBT on replevin bond. The plaintiff in replevin was *non-prossed*, and the defendant had judgment for a return. The writ of *retorno habendo* was returned "*elongata*."

Mr. Wallach, for the defendant Hazel, offered to give evidence, in mitigation of damages, that the property of the goods replevied was in him; and cited *McDaniel v. Fish*, in this Court, at December Term, 1818, (2 Cranch, C. C. 160,) and *Wilson v. Slye*.

The COURT, at first, thought that the evidence was not admissible, because it was matter of defence to the original suit, of which the plaintiff in that suit might have availed himself, but did not, and that the defendant could not give evidence that the plaintiff in this suit ought not to have had judgment in the replevin; but, upon reconsideration, permitted the defendant to give the evidence, reserving a right to the plaintiff to move for a new trial, on the ground of admitting improper evidence.

Verdict for the plaintiff, \$200 damages.

 NEGRO WILLIAM v. VAN ZANDT AND ESTES.

In a suit for freedom, a judgment against the defendant, upon his disclaimer, and default in not rejoining, is not *prima facie* evidence of the freedom of the petitioner, in a subsequent suit by him against another defendant, although this other defendant should, after such judgment, have filed a paper in that suit, claiming the petitioner as his slave.

Possession of, and acts of ownership over, a colored person, are *prima facie* evidence of slavery and ownership; and a sale of a slave by the importer, within three years after importation, gives the slave his freedom if such importer be the sole owner; but if the importer has only a distributive interest, with others, in the slave, such sale does not give freedom.

PETITION FOR FREEDOM. Upon a former petition against Milburne, judgment was rendered in favor of the petitioner, upon the default of Milburne to rejoin.

Milburne had, in that case, disclaimed to hold the petitioner as a slave; to which the petitioner replied certain facts, showing that Milburne had purchased the petitioner, and did claim and hold him. To this replication Milburne was ruled to rejoin, and, upon his failing to comply with the rule, judgment by default was rendered against him.

Mr. Key and *Mr. J. Dunlop*, for the petitioner, offered the record of that judgment as *primâ facie* evidence of his freedom.

The COURT (*MORSELL, J., contra*,) rejected the evidence.

Mr. Key then offered in evidence a paper filed by the defendant, Van Zandt, in this Court, after the judgment in the case against Milburne, praying the Court to order the petitioner, William, to be delivered to him, claiming under authority of *Mr. Estes*, administrator of the estate of *Dr. W. W. Southall*, which the Court then refused to do; and *Mr. Key* thereupon contended that that act of *Mr. Van Zandt* made the whole record in that case evidence in this. The Court, however, still rejected the record; but said that the acts or declarations of *Mr. Van Zandt* might be given in evidence.

Mr. Key then offered evidence to prove that a certain *Mrs. Straas* had possession of, and exercised acts of ownership over, the petitioner, and imported him into this county, and delivered to the clerk a list of slaves imported by her, including the name of the petitioner; and that she afterwards, within three years after such importation, sold him to one *Coburn*, in this county, contrary to the Act of Assembly of Maryland, 1796, c. 67, § 3.

Whereupon the COURT, at the motion of the petitioner's counsel, instructed the jury that the possession and acts of ownership by *Mrs. Straas* were *primâ facie* evidence of title.

And the COURT (*CRANCH, J., contra*,) refused to instruct the jury that if *Dr. Southall* died possessed of the slave, and the defendant, *Estes*, was his administrator, then the sale by *Mrs. Straas* was not sufficient to entitle the petitioner to his freedom.

But the COURT (*nem. con.*) instructed the jury that if *Mrs. Straas* had only a distributive share in the slave, her sale could not entitle the petitioner to his freedom; but that if, from the whole evidence, they should find that *Mrs. Straas* was in possession and exercised acts of ownership, and several of the distributees knew it and did not object, and that *Estes* never claimed the slave until after the sale, they may presume that she had good title. And the Court refused to say that the evidence did not justify such an inference. Verdict for petitioner.

Motion for new trial overruled. Judgment for petitioner.

THE UNITED STATES v. CHARLES W. FORREST.

An indictment under the 16th section of the Act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," must state that the defendant was employed

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in the bank, or an office of discount and deposit, &c., in some State or Territory of the United States.

The certainty required in an indictment is certainty to a certain intent; certainty to a common intent is not sufficient. Nothing material can be taken by intendment. From the averment, that the defendant was a bookkeeper in the office of discount and deposit, the Court, upon demurrer to the indictment, cannot infer that he was a clerk or servant employed in such office.

A count upon the same section, for embezzlement, must aver that the thing embezzled came to his hands, or possession, by virtue of his employment. It is not sufficient to state that it came to his hands "as bookkeeper," or "in virtue of his office as bookkeeper," or "while he acted as bookkeeper." It must appear that he had authority from the bank to have it in his custody or possession, at the time of embezzlement.

It is not necessary that the thing embezzled should be the property of the Bank of the United States; nor is it necessary to aver it to be the property of any particular person; but it must be averred to have been fraudulently embezzled. "Feloniously" will not supply the place of "fraudulently." The offence must be charged in the words of the Act.

A check is not, by name, made the subject of embezzlement; and *quære* whether, if it be a paid or cancelled check, it can be included in the description, "other valuable security or effects"?

Quære, whether the District of Columbia was a Territory within the meaning of the Act.

INDICTMENT under the 16th section of the Act of Congress of the 3d of March, 1825, c. 65, (pamphlet, p. 65,) [4 Stat. at Large, 118,] "more effectually to provide for the punishment of certain crimes, against the United States, and for other purposes," for embezzling a check for \$135.

The sixteenth section is as follows:—"That if any person, who shall be employed as president, cashier, clerk, or servant, in the Bank of the United States, created and established by an act entitled," &c., passed on the 10th day of April, 1816, or in any office of discount and deposit established by the directors of the said bank in any State or Territory of the United States, shall feloniously steal, take, and carry away any money, goods, bond, bill, bank-note, or other note, check, draft, treasury-note, or other valuable security or effects belonging to the said bank, or deposited in said bank:

"Or if any person, so employed as president, cashier, clerk, or servant, shall fraudulently embezzle, secrete, or make way with any money, goods, bond, bill, bank-note, or other note, draft, treasury-note, or other valuable security or effects, which he shall have received, or which shall come to his possession or custody, by virtue of such employment; every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offence."

The indictment contained fifteen counts, to which there was a general demurrer.

The attorney for the United States, (*Mr. Swann*,) abandoned the counts numbered 1, 3, 9, 10, 11, 12, 13, 14, and 15.

The second count charges that the defendant, "on the 7th of April, 1825, (he the said Charles being then a bookkeeper in the said Office of Discount and Deposit,) with force and arms at the county aforesaid, feloniously did embezzle and make way with the sum of \$135 of the money of the President, Directors, and Company of the Bank of the United States, which came to the hands of him the said Charles, in the Office of Discount and Deposit aforesaid, and while he acted as bookkeeper aforesaid, against the form and effect of the statute in that case made and provided," &c.

The fourth count charges "that the said Charles, on the 7th day of April, 1825, he being then a bookkeeper in the said Office of Discount and Deposit, with force and arms at the county aforesaid, and in the office aforesaid, did fraudulently and feloniously secrete a certain check of one George McDaniel, upon said Office of Discount and Deposit, for the sum of \$135, which had been paid by the said office, and had become the property of the President, Directors, and Company of the Bank of the United States; and had come to the hands and possession of the said Charles, in virtue of his said office as bookkeeper aforesaid, against the form of the statute," &c.

The fifth count charges "that the said Charles, on the 4th of May, 1825, he then being a bookkeeper in the said Office of Discount and Deposit, with force and arms at the county aforesaid, did feloniously embezzle and make way with the sum of \$100 of the money of the President, Directors, and Company of the Bank of the United States, which came to the hands and possession of him the said Charles in the Office of Discount and Deposit, while he acted as bookkeeper as aforesaid, and in virtue of his office aforesaid, against the form of the statute," &c.

The sixth count charges "that on the 3d of October, 1825, he being then a bookkeeper in the said Office of Discount and Deposit, with force and arms at the county aforesaid, and in the office aforesaid, did feloniously embezzle and make way with the sum of \$250 of the money of the President, Directors, and Company of the Bank of the United States, which came to his hands and possession in the Office of Discount and Deposit, while he acted as bookkeeper as aforesaid, and in virtue of his office aforesaid, against the form of the statute," &c.

The seventh count charges "that he, being a bookkeeper," &c., did "fraudulently and feloniously secrete a certain check for \$100, drawn by Lewis Edwards upon the said office, which said check had become the property of the said President, Directors,

and Company of the Bank of the United States, and had come to the hands and possession of the said Charles as bookkeeper aforesaid, against the form of the statute," &c.

The eighth count charges "that on the 3d of October, 1825, he being then a bookkeeper in the said office of discount and deposit, with force and arms at the county aforesaid, did fraudulently and feloniously secrete a certain check for \$250, drawn by one Lewis Edwards on the said Office of Discount and Deposit, and which said check had been paid by the said office, and had become the property of the said Bank of the United States, and had come into the hands and possession of the said Charles as bookkeeper aforesaid, against the form of the statute," &c.

Mr. Jones and *Mr. Key*, for the defendant, objected to the second count, that it does not charge that the defendant fraudulently embezzled the money, nor that he was employed by the bank, nor that he received the money by virtue of such employment, nor that he was "president, cashier, clerk, or servant" of the bank, nor that the money was the property of the bank.

To the fourth count, that it states that the check had been paid by the bank, and was, therefore, not a valuable security. That it does not state that the defendant had been employed by the bank, nor that he had received the check by virtue of such employment, &c. That it does not specify the date of the check.

They took the like exceptions to the fifth, sixth, seventh, and eighth counts, and cited 2 Hawk. b. 2, c. 25, § 71, 110; 3 Chitty, Cr. L. 936, 980, 986; *The King v. McGregor*, 3 B. & P. 106.

Mr. Swann and *Mr. Lear*, *contrà*, cited 1 Chitty, Cr. L. 168, 173, in the notes; 3 Hawk. 320; 3 Chitty, 979, 985, 1185.

CRANCH, C. J. The persons liable to be prosecuted under the sixteenth section of the Act of Congress of the 3d of March, 1825, c. 65, [4 Stat. at Large, 118,] are persons employed as president, cashier, clerk, or servant, in the Bank of the United States, or in any office of discount and deposit established by the directors of the said bank in any State or Territory of the United States.

The offences under that section are, 1st. Feloniously to steal, take, and carry away any money, goods, bond, bill, bank-note, or other note, check, draft, treasury note, or other valuable security or effects belonging to the said bank, or deposited therein; 2d. Fraudulently to embezzle, secrete, or make way with any money, goods, &c., (as above stated, but omitting the word "check,") "which he shall have received, or which shall come to his possession or custody, by virtue of such employment."

None of the counts states that the defendant was employed

either as president, cashier, clerk, or servant in the Bank of the United States, or in any of its offices of discount and deposit. The averment in each of them is, "being then a bookkeeper in the said Office of Discount and Deposit." The word "employed" is not in any one of the counts. It is a very important word in the sixteenth section of the act; for it is the only word which connects the person with the bank as its officer, and designates his appointment and trust. A person may be a bookkeeper in an office of discount and deposit, and yet not be an officer appointed by the bank or by the office. The intention of this section of the act is clearly to punish frauds in the officers of the bank duly appointed and employed by the bank. Perhaps it might be sufficiently certain to a common intent to say that a bookkeeper, in an office of discount and deposit, means a clerk or servant employed in an office of discount and deposit. But certainty to a common intent is not sufficient in an indictment. It must be certainty to a certain intent. 8 Co. 57 a; *Rutland's case*, Co. Lit. 303 a; *Long's case*, 5 Co. 21 a; *Colthirst v. Beinshin*, Plowden, 26 - 36; *The King v. Stevens and Agnew*, 5 East, 257; *Rex v. Lyme Regis*, Doug. 158; 1 Chitty, Pleadings, 235, 240; 2 Hawk. P. C. c. 25, § 60; *The King v. Airey*, 2 East, 33, 34, 35; Com. Dig. Pleader, C. 24; 1 Chitty, Plead. 255, 308, 513, 514, 516, 517, 518.

Every thing material must be positively alleged. Nothing material can be taken by intendment. *Non constat* by the indictment that a bookkeeper "in" an office of discount and deposit is a clerk or servant employed in such office.

None of the counts avers that the things secreted or embezzled came to his hands or possession by virtue of his employment. Here the word employment means his authority from the bank. The thing embezzled must have come to his possession or custody by virtue of his authority from the bank, or he cannot be convicted under this statute. To say that it came to his hands while he acted as bookkeeper, as in the second and fifth counts, without showing that he so acted under an employment by the bank; or to say that it came to his hands in virtue of his office as bookkeeper, as in the fourth and sixth counts; or that it came to his hands as bookkeeper, as in the seventh and eighth counts, without showing that he was employed by the bank, that is, was authorized by the bank to act as bookkeeper, is not a sufficient allegation that it came "to his possession or custody by virtue of such employment." For these reasons we are of opinion that all the counts are bad.

There is another objection which goes to the whole indictment; but as we think the others sufficient and this doubtful,

we shall give no opinion upon it. We mean the objection, that the office of discount and deposit at Washington is not established in any State or Territory of the United States.

There are other objections also to particular counts.

As to those which charge the defendant with embezzlement of money, it is objected that the money is not averred to be the property of the Bank of the United States; and although it is not necessary to constitute the offence of embezzlement under the second branch of the 16th section, that the things embezzled should be the property of the Bank of the United States, yet it is said that it must be averred to be the property of some person.

This objection we do not think sufficient.

It is also objected that those counts do not aver that the defendant fraudulently embezzled, &c.

This objection we take to be good; for it is a part of the description of the offence that it should be done fraudulently; and no allegation that it was done feloniously can supply the place of the word fraudulently; for it was not feloniously unless it were fraudulently done. 2 Hawk. B. 2, c. 25, § 110.

This objection applies to the 2d, 5th, and 6th counts.

To the 4th, 7th, and 8th counts, it is objected that it is not averred, that the check was a valuable security, or a draft; and a check, as such, is not within the words of the section upon which this indictment purports to be framed. A check, *ex vi termini*, is not, *ex necessitate*, a draft or a valuable security, especially after it has been paid by the party on whom it was drawn, and cancelled. The offence must be charged in the words of the act.

I think this also a valid objection.

The majority of the judges, however, upon this last point, are of a different opinion.

THRUSTON, J., argued against the opinion of the Court, upon the other points also, but concluded that he would not dissent.

Judgment for the defendant on the demurrer.



UNITED STATES, for the use of Ann Moxley, v. PETER RITTER
et ux. Administratrix of John Lyon.

In an action upon the administration-bond, to recover a distributive share of the estate, the administrator may retain for necessities furnished to the distributee.

DEBT on the administration-bond; breach, in not paying Ann

Moxley's distributive share of the estate of John Lyon, deceased. The defendants claimed to retain for her board and education.

Mr. Swann, for the plaintiffs, contended that if the defendants had been guardians they would not have been allowed more than the income of the estate unless previously authorized so to do by the Orphans' Court. As administrators, they had no right to make advances on account of the distributive share. The guardian was the proper person to provide for the support and education of the distributee. See the Maryland testamentary law, 1798, c. 101, § 12.

Mr. Key, contra, said it was not a set-off; it was payment in advance of the distributive share; and the administrator may in his discretion make such advances, either to the guardian, or to the distributee, and may retain therefor. *Dale v. Sollet*, 4 Burr. 2133.

The COURT said, that as this was a suit against the defendants, as administrators, and not as guardians, the law of Maryland, limiting the expenses of guardians to the income of the estate, did not apply; and that the defendants might retain for necessities furnished to the distributee, according to her estate, condition, and circumstances.

Verdict for the defendants.

SAMUEL WINTER & SAMUEL G. BOWMAN, Survivors of Joshua Bowman, v. JOHN W. SIMONTON.

In an action of covenant by two survivors, upon a charter-party made with three persons, the declaration should state the death of one, and aver that the defendant had not paid the money to the three, or to either of them.

COVENANT, on a charter-party made to Samuel Winter, Samuel G. Bowman, and Joshua Bowman.

The declaration was in this form: — "John W. Simonton, late of Washington county, was summoned to answer to Samuel Winter and Samuel G. Bowman, survivors of Joshua Bowman, in a plea that he keep with them the covenants made between the said Samuel Winter, and Samuel G. Bowman, and one Joshua Bowman, now deceased, and the said John W. Simonton according to the force, form, and effect of certain articles of agreement of charter-party executed between them, &c., and whereupon the said Samuel Winter and Samuel G. Bowman, by Samuel B. Barrell their attorney, say," &c.

And after setting forth the terms of the charter-party, and the employment of the vessel by the defendant, until she was totally

lost by the perils of the sea, and that according to the terms of the charter-party the sum of \$2,734.17 had become due by the defendant, of which he had notice, "yet though often requested the said Simonton has never paid said sum of \$2,734.17 to the plaintiffs, but hath wholly refused and neglected so to do contrary to the form and effect of the said charter-party, and of the said covenants of the said defendant, by him in that behalf made with the said plaintiffs in manner and form aforesaid," &c.

To this declaration the defendant demurred generally; and objected,

1. That the death of Joshua Bowman is not stated in the declaration, but only in the recital of the writ, which is no part of the declaration, but a mere formal part of the record to be made up by the clerk.

2. That it is not averred that the money was not paid to Joshua Bowman in his lifetime. 2 Selw. N. P. 405, 406; Hardres, 320; 1 Chitty, Pl. 79, note, 304, 317, 326.

3. That it is not averred that the defendant did not give good bills on Boston, New York, or Philadelphia, which by the terms of the charter-party he was allowed to do.

Mr. Jones, for the plaintiffs, contended,

1. That the recital was a sufficient averment of the death of Joshua Bowman. 1 Har. Ent. 35.

2. That the averment that the defendant had never paid the money, implies that it was not paid to the three, or either of them.

3. That although there were two modes of payment allowed, yet a general averment of non-payment included both.

Mr. R. S. Coxe, in reply.

1. The death of Joshua Bowman is only suggested in the recital of the writ. There is no averment of his death upon which the defendant could take issue. The precedents all require a positive averment of the death in the declaration. 1 Har. Ent. 35, 163; 2 Chitty, 45; 2 Selw. 405.

2. The averment in the declaration is that the defendant did not pay the money to the plaintiffs; but he might have paid it to Joshua in his lifetime. The covenant is to pay to the three, not to two only. The breach should be coextensive with the covenant.

3. The covenant upon oyer differs from the statement of it in the declaration, where it does not appear to be in the alternative.

The COURT, (MORSELL, J. absent,) said that the 2d objection was fatal, and gave no opinion as to the others. The plaintiffs had leave to amend on payment of costs.

McGunnigle v. Blake.

HALL, for the use of Carter, v. Fox.

An interested witness who has been sworn in chief and examined, and whose interest is disclosed upon cross-examination, may be released, and reexamined.

A release of a witness may be executed by the party, leaving a blank, for the name of the witness, to be filled up by the party's attorney.

A. T. F. BILL was examined on his *voir dire*, and said he was not interested, and was, thereupon, sworn in chief for the plaintiff. Upon his cross-examination his interest was disclosed, and the plaintiff then offered to release and reexamine him.

But the COURT refused to permit him to be reexamined after tender of the release; saying that as he had already given his testimony, he was interested by all the pains and penalties of perjury, to affirm what he had already testified. But upon looking into 4 Starkie on Ev. 758; *Callow v. Mime*, 2 Vern. 472; *Sikes v. Marshall*, 2 Esp. Ca. 708; *Heyl v. Burting*, 1 Caines's Rep. 14; *Doty v. Wilson*, 14 Johns. 378; *City Council v. Haywood*, 2 Nott & McCord, 308;—The COURT (*nem. con.*) said it was an objection to the credit, and not to the competency of the witness.

The release had been sent to Mr. C. Cox, upon his request by letter, in which he mentioned the name of the witness who was to be released. The release was signed and sealed without a subscribing witness, and a blank left for the name of the witness who was to be released, and inclosed in a letter from Mr. Carter to Mr. Cox, in which he approved of his suggestion to release the witness. Mr. Cox testified to these facts, and that he was acquainted with the handwriting of Mr. Carter, having received many letters from him, in answer to his own, upon business, but had not seen him write. He believed the release and its signature to be in the handwriting of Mr. Carter. He filled up the blank, as he thought himself authorized to do.

The COURT said that the execution of the release was sufficiently proved; and permitted the witness to be reexamined.

ANN MCGUNNIGLE v. BETTY H. BLAKE.

In an action for mere use and occupation, not founded on an express contract for an entire rent, eviction of part is not a bar to the whole action.

ASSUMPSIT, for use and occupation.

Plea; eviction of part, in bar of the whole action.

Mr. Wallach, for the plaintiff, contended that if Mrs. Blake re-

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sumed the occupation, it was a waiver of the eviction, and restored the plaintiff to her right of action. 1 Esp. N. P. p. 2, 72; 4 Stark. on Ev. 1520, 1521; *Smith v. Raleigh*, 3 Camp. 513; *Stokes v. Cooper*, 3 Camp. 514; *Fitchburg Company v. Melvin et al.*, 15 Mass. R. 270.

Mr. Morfit, for the defendant.

The COURT said that in an action for mere use and occupation, not founded on an express contract for an entire rent, eviction of part is not a bar to the whole action; because the plaintiff is entitled to recover damages for the actual use and occupation; and if the defendant was deprived of the use for a certain part of the time, and afterwards resumed the occupation and use of the premises, the jury will consider that circumstance in estimating the damages.

UNITED STATES v. ABRAHAM WILLIAMS.

In an indictment under the 19th section of the Maryland Act of 1796, c. 67, for aiding and advising the transportation of a slave, there must be an averment of transportation from the district.

INDICTMENT under the 19th section of the Maryland Act of 1796, c. 67, for aiding, assisting, encouraging, and advising the escape of a female slave of W. L. Brent, "by means whereof she was put into a stage to be transported out of the District."

The words of the act are, "any person who shall be found to assist by advice, donation, or loan, or otherwise, the transporting of any slave, or person held to service, from this state, or by any other unlawful means depriving a master or owner of the service of his slave or person held to service; for every such offence the party aggrieved shall recover damages in an action on the case against such offender, and such offender also shall be liable upon indictment to be fined a sum not exceeding \$200."

The COURT said there must have been a transporting of the slave out of the District or the offence was not complete.

Verdict, not guilty.

JOSEPH FUGATE, Administrator of Gerrard Fugate, v. JEREMIAH W. BRONAUGH.

In a declaration by an administrator upon a bond to his intestate he must aver himself to be administrator, and make *profert* of his letters of administration.

DEBT, on bond to Gerrard Fugate, by his administrator.

United States v. Smith.

The declaration commences thus: —“ Washington County, to wit: — Jeremiah W. Bronaugh was attached to answer unto Joseph Fugate, administrator, &c., of Gerrard Fugate, deceased, of a plea that he render to the said Joseph \$1000, whereupon the said Joseph, by C. C. Lee, his attorney, complains,” &c.

The declaration contains no averment that the plaintiff was administrator, nor a *profert* of the letters of administration.

The defendant demurred specially for several assigned causes, but not for want of such an averment and *profert*.

But the COURT, considering it a good cause of general demurrer, rendered judgment for the defendant, for want of an averment that the plaintiff was administrator, and for want of a *profert* of the letters of administration.

DOWSON and others v. PACKARD.

An attachment, issued by order of the court, under the 10th Rule of practice prescribed by the Supreme Court of the United States for the Circuit Courts, against a defendant in equity for not answering the bill, must not be made returnable to the clerk at the Rules, but may be issued by the court, returnable immediately to the court.

THE defendant Packard was brought in upon an attachment, for not answering the bill. This attachment was issued by order of the Court at this term, on the 10th of January, 1827, and made returnable by the clerk before himself at the Rules on the first Monday in April next.

Mr. Jones, for the defendant, moved to quash the attachment; or to discharge the defendant without answer, upon merely entering his appearance.

The COURT (*nem. con.*) quashed the attachment, because it was made returnable at the Rules.

Mr. Redin, then moved the Court for an attachment to bring in the defendant to answer the interrogatories contained in the bill; not having filed any other interrogatories.

The COURT (*nem. con.*) granted the attachment for not answering the bill generally.

UNITED STATES v. JOHN K. SMITH.

A debtor of the United States had been discharged from custody by order of the President of the United States under the Act of the 3d of March, 1817, and had entered into an agreement with the marshal for payment of his poundage fees by instalments, with a proviso that if any instalment should not be paid when due, the

Strider v. King.

marshal should take out a new *ca. sa.* for his fees. *Held* that he could not be detained upon the new *ca. sa.*; and the Court refused to order him to be committed.

THE defendant, upon being ordered by the President of the United States to be discharged from a *ca. sa.* issued for a debt due to the United States, and being still holden in custody by the marshal for his poundage fees, which amounted to more than \$4000, agreed with the marshal to pay those fees by instalments, and that if he should make default, the marshal should obtain a new *ca. sa.* and arrest him again. He made default and the marshal took out a new *ca. sa.* in the name of the United States for his fees. Upon this new *ca. sa.* he was arrested and brought into court, and prayed to be committed.

Mr. Key, for the defendant, objected, that the defendant having been discharged by order of the President of the United States under the Act of March 3, 1817, [3 Stat. at Large, 399,] entitled "An Act supplementary to an Act for the relief of persons imprisoned for debts due the United States," could not be arrested again for the same cause. The marshal having relinquished the hold he had upon the person of the defendant, could only resort to his action upon the new agreement. After the principal debt has been paid this court has decided, in the case of *Causin v. Chubb*, at December term, 1805, (1 Cranch, C. C. 267,) that the marshal cannot detain the defendant for his poundage fees.

Mr. Lear, for the marshal, contended that that was the case of a *ca. sa.* under the Maryland law, entered "not called by consent," in which case the plaintiff may always have a new *ca. sa.*

But the COURT (*nem. con.*) refused to order the defendant to be committed.

STRIDER v. KING *et al.*, being the Administrator, Heirs, and Creditors of George King, deceased.

A purchaser of land, who had paid a large part of the purchase-money, and had only a right to call for the legal estate upon payment of the balance, sold it to the first vendor for a less price, and took his bonds with surety for the amount due.

The land was afterwards sold by a trustee under a decree of this Court upon a bill filed by the creditors of the first vendor, showing a deficiency of personal assets: *Held*, that the first vendee, who had thus resold the land, had no lien upon it as against creditors, for the balance due to him upon such resale; because he never had the legal estate; and because he had taken a separate security.

THIS was a bill in equity to charge the land, or rather the proceeds of the sale of the land, in the hands of a trustee who had sold it under a decree of this Court on a bill filed by creditors

Kurtz v. Hollingshead's Heirs.

of the late George King, to charge the real estate, for the deficiency of personal assets for the payment of his debts.

Mr. George King sold the land to Mr. Strider, the complainant, who paid \$3600 out of \$5000, which was the whole price of the land, and would have had a right to call for the legal estate upon payment of the balance. Mr. Strider, not having obtained the legal estate, resold the land to Mr. King at a less price, and took his bonds with Mr. Boone as his surety, for the amount due upon this resale. Strider filed his bill against Charles King, the administrator, the heirs, and the creditors of George King, who had obtained the decree for the sale of the land to pay the debts of George King, claiming a lien on the land, and priority of payment out of the proceeds of the sale made by the trustee under the decree.

The question was argued by *Mr. Marbury*, for the complainant, and by *Mr. C. Cox* and *Mr. R. P. Dunlop*, for the defendants.

CRANCH, C. J. I think the complainant has no lien on the money in the hands of the trustee, because, 1. The complainant never had the legal estate; he had only a right to call for it upon payment of the balance of the purchase-money; and when he agreed to rescind that contract he lost that right. 2. Because he took a separate security, namely, the bond of Mr. Boone.

The other judges concurred.

D. KURTZ, Trustee of the Bank of Columbia, v. HOLLINGSHEAD'S
HEIRS AND PERSONAL REPRESENTATIVES.

If a complainant in equity has lost his legal lien and priority, a court of equity will not set it up against other creditors equally meritorious.

THIS was a bill in equity for the sale of real estate mortgaged in August 1814, by Hollingshead to Kurtz, as trustee for the Bank of Columbia, by two deeds which were not recorded, and are now lost.

Mr. Melvin, one of the defendants, who indorsed other notes of Hollingshead, objects to the complainant's claim of priority, or lien upon the land.

The two deeds were in possession of the bank at the commencement of this suit, and the bill prayed that they might be recorded agreeably to the 11th section of the Act of Maryland, 1785, c. 72, which also provides that such deed, so recorded, should not "in any manner affect the creditors of the party making such deed, who may trust such party after the date of the said deed."

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The bill also prayed that the mortgages might be foreclosed, and the property sold for the payment of the debt.

CRANCH, C. J. The complainants are now seeking, in equity, to establish a legal priority. "Equity is equality." The equity of the other creditors is equal to that of the bank, and the bank has lost its legal priority. I think the bill must be dismissed, but without costs, as the deeds have been lost since the bill was filed.

THRUSTON, J. concurred. MORSELL, J., doubted.
Bill dismissed.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1827, AT ALEXANDRIA.

WILLIAM FOWLE *v.* THE CORPORATION OF ALEXANDRIA.

Under the law of Virginia the defendant may demur and plead to issue, to the whole declaration.

The Act of Virginia of 1796, "concerning corporations," which requires bond and security to be given by auctioneers, does not prescribe the condition of the bond, but leaves it to the discretion of the respective corporations; but when the condition has been fixed by a by-law, it cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law.

A corporation aggregate, having, or supposed to have, a corporate fund, is liable in an action at common law for negligence of its duty.

The inhabitants of Alexandria, as such, are no part of the corporation.

A judgment against the corporation cannot be levied on any inhabitant who is not a member of the common council.

The "Common Council of Alexandria" is an entirely new corporation erected by the Act of Congress in 1804, and derives all its powers from that act.

By that act, this new corporation is neither authorized to grant licenses to auctioneers nor to restrain them from exercising their business without license.

The old corporation erected by the Virginia Statute of 1779, by the name of "The Mayor and Commonalty of the town of Alexandria," was, by its own consent, destroyed by the repeal of that statute by the Act of Congress of 1804 erecting the new corporation.

The Virginia Act of 1796, "concerning corporations," was applicable only to corporations then existing, and created no duty or obligation upon any corporation subsequently erected.

THIS was an action upon the case against "the Common Council of Alexandria," for negligence in licensing an auctioneer without taking bond and security according to the Virginia Act of 1796, "concerning corporations," and the by-law of "the Mayor and Commonalty" of the 5th of February, 1800. By an Act of the Legislature of Virginia in the year 1779, the mayor, recorder, aldermen, and common councilmen, elected in the manner therein prescribed, were made a body corporate and politic by the name of "Mayor and Commonalty of the town of Alexandria."

By the Virginia Act of December 22, 1796, "concerning corporations," it is enacted that "the mayor, aldermen, and commonalty of the several corporate towns in this commonwealth, and their successors, shall, upon request of any person or persons desirous thereof, grant licenses to exercise, in such town, the trade

or business of an auctioneer; provided that no such license shall be granted until the person or persons requesting the same, shall enter into bond with one or more sufficient sureties payable to the mayor, aldermen, and commonalty of such corporate town and their successors, in such penalty, and with such condition as by the by-laws and ordinances of such corporate town, shall be required."

By the by-law of February 5, 1800, it is enacted that "the mayor and commonalty shall grant to any person or persons desiring the same, a license to exercise the trade or business of an auctioneer, within the town; provided that no such license shall be granted, until the person or persons applying, shall enter into bond with one or more good securities, in the sum of \$20,000 payable to the mayor and commonalty, and conditioned for the payment of the annual rent of \$500 to the mayor and commonalty, in quarterly payments, for the said office; and for the due and faithful performance of all the duties of the same; which bond shall not become void on the first recovery, but may be put in suit and prosecuted, from time to time, by, and at the costs of any person injured by a breach thereof, until the whole penalty shall be recovered."

The by-law regulates the fees and commissions of the auctioneer and prescribes his duties; one of which is that he shall, in three days after any sale made, deliver, to the owner of the goods sold, a fair account of the sale, and pay the amount of the money received, deducting therefrom his fees and commissions. By the Act of Congress of the 25th of February, 1804, [2 Stat. at Large, 255,] "to amend the charter of Alexandria," after providing for the election of a common council, it is enacted "That the common council, so elected, and those thereafter to be elected and their successors shall be and hereby are made a body politic and corporate by the name of 'the Common Council of Alexandria,' with the usual corporate powers; and all the estate, rights, and credits now vested in the Mayor and Commonalty of the town of Alexandria, shall be vested in the said common council when elected, and may be recovered in their name for the use of the said town, and in like manner all claims and demands against the Mayor and Commonalty of Alexandria, prior to the operation of the present act, may be prosecuted and recovered against the aforesaid common council." They were authorized to appoint all officers deemed necessary for the execution of their laws; but no power was thereby given to appoint or to license auctioneers. The 12th section enacts "that so much of any act or acts of the General Assembly of Virginia, as comes within the purview of this act, shall be and the same is hereby repealed. Provided that

nothing herein contained shall be construed to impair or destroy any right or remedy which the Mayor and Commonalty of Alexandria now possess or enjoy, to or concerning any debts, claims, or demands against any person or persons whatsoever, or to repeal any of the laws and ordinances of the mayor and commonalty of the said town now in force, which are not inconsistent with this act."

In June, 1817, the Common Council of Alexandria passed "an act to amend the act for licensing auctioneers, and for other purposes," by which it is enacted "that every person obtaining a license to exercise the business of an auctioneer within the town of Alexandria, shall annually apply for, and obtain a renewal of his license, and shall also annually renew his bond in the manner provided by law; and every person failing to renew such license, and give bond annually, shall cease to exercise the business of an auctioneer, and shall be proceeded against accordingly."

The declaration contained three counts.

The first count, after setting forth the by-laws of the 5th of February, 1800, and 3d of June, 1817, avers that on the day of 1815, the Common Council of Alexandria granted a license to one Philip G. Marsteller, to exercise the trade of auctioneer in Alexandria, and continued to renew the same from year to year until the day of 1819, during which time he sold at auction for the plaintiff goods to the amount of

which sum he failed to pay to the plaintiff, who recovered judgment against him for that sum, and obtained a *feri facias*, which was returned *nulla bona*; at the time of which judgment, long before, and ever since, he was and is wholly insolvent; by reason whereof, the plaintiff became entitled to the benefit of the bond and security required to be taken as aforesaid by the said "common council" previous to granting the said license, as aforesaid; yet the defendants not regarding their duty in that behalf, but contriving, &c., did not, nor would not, take any bond and security as aforesaid, from the said P. G. M. "during the time when the transactions aforesaid, between the plaintiff and the said Philip took place, but on the contrary thereof, so carelessly, negligently, and improperly conducted themselves in the premises, that by and through the negligence, carelessness, and default of the defendants in the premises, no bond and security was taken from the said Philip to which the plaintiff can resort, and the money due to him as aforesaid is wholly lost to the plaintiff," &c.

Second count, and whereas also the said Common Council of Alexandria, on the 1st of April, 1815, did license and permit

one P. G. M. to carry on the trade and business of auctioneer in the town of Alexandria, and so from year to year to the 1st of February, 1819, and the said Philip in virtue of the said license and permission did carry on the said trade and business of auctioneer in the said town during the whole of the period aforesaid, and the plaintiff believing that the said common council had well and faithfully performed their duty in taking, from the said Philip, bond and security for the faithful discharge of his duty as auctioneer aforesaid, and confiding in the same, did deliver to him the said Philip, from time to time during the years 1815, 1816, 1817, and 1818, goods, wares, and merchandise to the value of \$10,000 and upwards, to be sold by him as auctioneer as aforesaid; and the said Philip, as auctioneer aforesaid did sell the said goods, wares, and merchandise at auction aforesaid, and did become indebted to the plaintiff, by means of the said sales at auction as aforesaid in the sum of \$1,583.09, which said sum the said Philip, although often required, altogether failed and refused to pay to the plaintiff. And the said plaintiff saith that the said Philip was at the time he became so indebted, altogether insolvent and unable to pay the said sum of money, by means of which said premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the said common council upon granting the license to the said Philip to exercise the trade and business of auctioneer as aforesaid. Yet the said common council not minding their duty in the said premises, but contriving to injure and deceive the plaintiff, altogether failed to take any bond or security from the said Philip for his license to carry on the trade and business of auctioneer for the years 1815, 1816, 1817, and 1818 as aforesaid; in consequence and by means of which said failure the plaintiff hath altogether lost the debt so due to him from the said Philip to the plaintiff as auctioneer aforesaid, and therefore the plaintiff saith he is injured and hath sustained damage to the value of \$3,000, &c.

The third count sets forth the Act of Virginia of 1796, entitled "An Act concerning Corporations," and the by-laws of 1800 and 1817, and avers that the common council of Alexandria did knowingly suffer and permit the said P. G. M. to exercise the trade and business of an auctioneer within the said town from the 1st of January, 1815, to the last day of December, 1819; and during that period did take and receive from the said P. G. M. the annual sum of five hundred dollars as a rent for exercising the said trade and business of auctioneer as aforesaid, and the plaintiff believing that the said common council had taken bond and security from the said P. G. M. for the faithful

performance of his duties of auctioneer, &c., did from time to time during the said period, deliver to him goods to be sold by him as auctioneer; and that he so sold them to the amount of \$1,583.09, and failed to pay the same to the plaintiff; and was, when he so became indebted, altogether insolvent; by means of which premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the common council as aforesaid; yet the said common council, not minding their duty in the premises, but contriving, &c., failed to take such bond and security; in consequence of which failure the plaintiff has lost the debt due from the said P. G. M. to the plaintiff, whereby he is injured, &c.

To this declaration there was a general demurrer and joinder.

The defendants were also permitted to plead sundry matters of fact in bar, under the Virginia statute of the 12th of December, 1792, § 40, which enacts, "That the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

Mr. Taylor, for the defendants, contended that no action for a tort lies against a public corporation; that the "common council" had no power to grant licenses to auctioneers either under the charter of 1779 or 1804. The Virginia law of 1796 does not prescribe the condition of the bond; it might have been only for payment of the rent or tax. They were not bound to provide for the security of those whose goods should be sold by the auctioneer. If the plaintiff has any remedy it is rather against the individual members of the common council, than against the public body which is a municipal corporation; and would have no right to pay the damages out of the public funds; nor would it have a right to lay a tax for such a purpose. The act of 1796 only gives the power of licensing auctioneers to the mayor, aldermen, and commonalty of the several corporate towns within the commonwealth. That act was applicable only to corporations then existing. The corporation, known by the name of the Mayor and Commonalty of the Town of Alexandria, which then existed, was dissolved, with its own consent, by the Act of Congress of 1804, [2 Stat. at Large, 255,] which erected a new corporation by the name of "the Common Council of Alexandria." This new corporation derived no power from the Virginia Act of 1796. It had no right to require the bond. The act of 1796 requires the bond to be made payable to the "mayor, aldermen, and commonalty," — the by-law requires it to be made payable to the mayor and commonalty only.

Mr. Swann, contra, contended that the corporation is liable

for torts done within the sphere of its powers, and has power to raise money to pay the damages. *Townsend v. Susquehanna Turnpike*, 6 Johns. 91; *Yarborough v. Bank of England*, 16 East, 6; *Riddle v. Proprietors, &c.* 7 Mass. 169; *Holmes v. Remsen*, 20 Johns. 230; *Patterson v. Bank of Columbia*, 7 Cranch, 306.

The charter of 1804, does not repeal the Virginia Act of 1796, nor the by-law of 1800.

Mr. Jones, in reply. The people of the town are no part of the corporation. The corporation is the government, the inhabitants are the governed. No action can be maintained by the governed against their governors for neglect of duty. The people are not responsible for the neglect of their government. The corporation cannot tax the people for the torts or negligence of the corporation. It is not the subject of a private action. All the powers of the new corporation are those given by the charter of 1804.

CRANCH, C. J. The Act of Virginia of 1796, "concerning corporations," requires that bond and security shall be taken; the condition, however, is left to the discretion of the corporation; but that condition, when once fixed by a by-law, is necessary, and cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law.

The first question is, whether the corporation is liable in an action upon the case at common law, for negligence of its duty.

In the case of *Yarborough v. The Bank of England*, 16 East, 6, it is decided that trover will lie against a corporation aggregate; *a fortiori* an action upon the case for negligence, which requires no evidence of any act done by the defendants, but is for a mere omission. In the case of *Riddle v. Proprietors of Locks &c.* 7 Mass. 169, it is decided that case lies against a corporation aggregate, for neglect to make the canal as wide and deep as required by statute, whereby the plaintiff suffered damage. In that case Mr. Chief Justice Parsons takes "a distinction between proper aggregate corporations and *quasi* corporations, such as counties and towns in Massachusetts, which are invested with particular powers without their consent. No private action can be maintained against them for breach of their corporate duty, unless such action be given by statute; and the reason is, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose but in a case where the statute is an authority to which every man must be considered as assenting.

But in regular corporations which have, or are supposed to have a corporate fund, this reason does not apply."

In such cases, where an action is given by statute, it is cumulative. Is the Common Council of Alexandria such a regular corporation, having or supposed to have such a corporate fund? I think it is.

The inhabitants of Alexandria, as such, are no part of the corporation. The judgment cannot be levied on any inhabitant who is not a member of the common council. None of the inconveniences mentioned by the Court in the case of *Russel v. The men dwelling in the County of Devon*, 2 T. R. 267, can occur in this case.

If the corporation granted the license contrary to law, without taking the bond and security required by law, and the plaintiff has thereby sustained a special damage, I think he may maintain his action upon the case, at common law, against the corporation.

But it is said, that the "Common Council of Alexandria" is an entirely new corporation, erected by the Act of Congress in 1804, and derives all its powers from that act. That by that act this new corporation is neither authorized to grant licenses to auctioneers, nor to restrain auctioneers from exercising their business without license. That the old corporation, "The Mayor and Commonalty of the town of Alexandria," which was erected by the statute of Virginia in 1779, was, by its own consent, destroyed by the repeal of that statute by the Act of Congress erecting the new corporation. That the Act of Virginia of 1796, "concerning corporations," which imposed the duty upon corporations to license all such auctioneers as should apply and offer the requisite bond and security, was applicable only to corporations then in existence, and could give no authority, nor impose any duty upon a corporation subsequently erected; and therefore that the new corporation had no authority, and was not bound to require the bond and security. That the by-law of the 5th of February, 1800, although not expressly repealed, was virtually of no effect, because the authority, upon which it was founded, had ceased to exist, and could create no obligation upon the "common council" to require bond and security.

In this view of the case I am inclined to concur. They cannot be bound by their own by-law unless they had authority to pass such a by-law; nor can the by-law of the old corporation bind the new, when the authority upon which that by-law rested is taken away. I am therefore of opinion that the judgment upon the demurrer should be for the defendants, upon all the counts.

It may be observed, also, that the first count does not state that the said P. G. M. ever received any money for the plaintiff; nor that the plaintiff ever demanded any from him; nor does it expressly aver that the loss happened in consequence of the negligence of the defendants; nor that the plaintiff believed that security had been given.

The second count does not refer to the by-laws, or to the Virginia Act of 1796; nor does the plaintiff aver it to be the duty of the common council to require the bond and security; nor that P. G. M. received the money for the sales, but says that he became indebted to the plaintiff "by means of said sales." There is nothing in this count which shows the obligation of the defendants, or the title of the plaintiff.

The third count does not state that the defendants granted any license, but knowingly permitted and suffered the said P. G. M. to carry on the business of auctioneer, and took no bond and security; but received the annual rent of 500 dollars. It does not state that the said P. G. M. received any money for the goods sold. This count I think is clearly bad.

MORSELL, J., concurred.

THRUSTON, J., gave no opinion.

Judgment for the defendants upon the demurrer. Affirmed by the Supreme Court, 3 Peters, 398.

LAWRENCE A. WASHINGTON *et al.*, Legatees of General George Washington, *v.* BUSHROD WASHINGTON *et al.* Executors of General George Washington.

A legatee under the will of General George Washington received by assignment from the executors, on account of his legacy, a bond and mortgage taken by them from a purchaser of the estate, which bond was for a sum larger than the legacy. The assignee covenanted not to hold the executors liable upon their assignment, and to pay back the surplus, and to indemnify and save harmless the executors from any damage by reason of the assignment. The obligor became insolvent, and the sales of the mortgaged property did not produce the amount of the legacy;—held, that the estate of General Washington was not liable under the 41st section of the Act of Virginia, of December 13, 1792, to make good to the legatee the deficiency; and upon a cross-bill he was held liable to the executors for the amount in which the assigned debt exceeded the legacy.

THIS was an amicable suit brought by certain residuary legatees under the will of General George Washington of Mount Vernon, to enable the executors to settle the estate. There was also a cross-bill filed by the executors against some of those residuary legatees who had purchased at the sales of the property, or had otherwise received more than the value of their

respective legacies. The original bill by the legatees against the executors, which is principally in the handwriting of the late Mr. Justice Bushrod Washington, one of the acting executors, states, "that General George Washington departed this life some time in the year 1799, having first duly made and published his last will and testament, bearing date the 9th of July, 1799, whereby, among other things he devised all the rest and residue of his estate, real and personal, not before disposed of by the said will to be sold by his executors, and the money arising therefrom to be divided into twenty-three equal parts, and applied as follows, to wit: to William A. Washington," &c., &c., naming the several legatees.

The bill states further, that a considerable part of the western lands which was susceptible of partition, as also other parts of the personal property, were divided among the said devisees in specie according to the proportions stated in the will. That the residue of the estate real and personal, a small part excepted, was sold by the two acting executors, the said Bushrod Washington and Lawrence Lewis, but to what amount the complainants are ignorant. They admit that considerable payments have been made to them by the executors, but they charge that a large sum still remains to be distributed, which the acting executors refuse to pay without the sanction of a court of equity. The bill then sets forth the names of all the residuary legatees and their assignees, and the personal representatives of such as had died; prays that the defendants may render an account of the sales of the property, and of the assets which have come to their hands, or which are still to be collected; and that the amount to which the complainants are respectively entitled may be ascertained, and that the defendants may be decreed to pay the same.

The defendants answered, admitting the facts stated in the bill, and submitting to account, &c.

By consent, the cause was referred to a master commissioner, to state and report an account, &c. Upon his report it appeared that the only case of difficulty was that of Thomas Hammond, who, as one of the residuary legatees, in right of his wife, was entitled to one whole share, that is, $\frac{1}{23}$ of the amount of the sales of the property, which share was \$5,179.09. Before this amount was ascertained, the executors assigned to him a mortgage, given to the executors by Burdett Ashton, Jr., (who was also entitled to $\frac{2}{3}$ of a share,) to secure a debt of \$9,410.20; which sum was supposed, after deducting Ashton's $\frac{2}{3}$ of a share, to be more than sufficient to pay the share due to Hammond, who accordingly gave the executors a mortgage upon his lands, to

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secure the refunding of the surplus; in which mortgage he covenanted to pay the same, and to indemnify and save harmless the executors from any damage, by reason of the assignment. There was, also, upon the assignment to Hammond of Ashton's mortgage, a memorandum, that the executors were not to be held liable as assignors. The property mortgaged by Ashton was sold under a decree of foreclosure, and did not produce enough to pay the legacies of Ashton and Hammond; whereupon Hammond claimed to have the deficiency made up by the estate of General Washington, under the 41st section of the Virginia Act of the 13th of December, 1792, which obliges the executors to sell perishable articles, and authorizes them to take bonds and security from the purchasers; "and if more be sold than will pay the debts and expenses, the executor or administrator may assign the bonds, for the surplus, to those entitled to the estate, and be discharged as to so much; and if, after such assignment, the obligor become insolvent, so as the money be lost, without the fault or neglect of the assignee, then such loss shall be made good to the assignee out of the decedent's estate."

CRANCH, C. J., delivered the opinion of the Court, as follows: — The Master Commissioner, (A. Moore,) in his report, has referred to the Court the claim of Thomas Hammond, in right of his wife, to $\frac{1}{3}$ of the *residuum* of General Washington's estate.

In the fifth article of his will he desires that all the residue of his estate, real and personal, may be sold by his executors, (if it cannot be equally and satisfactorily divided,) and the money divided into twenty-three equal parts, of which Mrs. Hammond was entitled to $\frac{1}{23}$, and Burdett Ashton to $\frac{2}{3}$ of $\frac{1}{23}$. A share was \$5,179.05. Burdett Ashton had purchased at the sale to the amount of \$9,410.20, and was entitled to a credit of his $\frac{2}{3}$ of $\frac{1}{23}$, which was not then ascertained, but afterwards appeared to amount to \$3,452.70. He gave a mortgage on the 12th of March, 1805, for the whole amount of his purchase, \$9,410.20; which, after deducting from it his $\frac{2}{3}$ of $\frac{1}{23}$, was supposed to be more than sufficient to pay Mrs. Hammond's share. The executors, on the 11th of March, 1806, assigned to Hammond, Burdett Ashton's debt and mortgage; and, on the same day, took from Hammond a mortgage to refund to the executors the surplus, after deducting Hammond's share from the balance of Ashton's debt, thus assigned to Hammond.

Upon or under the assignment of Ashton's mortgage was written a memorandum, that the executors were not to be made personally liable in any respect, or on any pretence whatever, for or by reason of that assignment; and that Burdett Ashton was

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to have credit for his proportion of \$5,179.05, (being the share of each legatee,) as well as for his sister's proportion; and one of the conditions of Hammond's mortgage was, that he should indemnify and save harmless the executors, against all claims, demands, or damages whatsoever, on account or by reason of the assignment and transfer of the aforesaid debt to him, the said Thomas Hammond, and to refund in case he should be liable so to do. He covenanted, also, to the same effect. The property mortgaged by Ashton was sold under a decree, and produced only \$3,908.46.

The debt of Ashton was	\$9410.20
He had a right to retain	3452.70

The real amount of Ashton's debt was	\$5957.50
Hammond's claim was	5179.05

The amount secured to the executors by Hammond's mortgage was	\$775.45
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This sum of \$775.45 then was, by the terms of the mortgage, to be absolutely paid by Hammond to the executors, whether Ashton became insolvent or not, or whether the land produced more or less than Hammond's claim. Such was his covenant. We therefore think that he could not have had recourse to the executors, even if he had not expressly exonerated them.

But it is said that the estate is not exonerated, although the executors are; and that the estate is liable, as assignor of Ashton's debt, under the equity of the 41st section of the statute of Virginia, of December 13, 1792, (P. & P. Rev. Code, 165,) which compels the distributees to take the specific bonds of purchasers of the personal estate, when sold because perishable; in which case, if the bonds are not good, they are to be made good out of the estate.

It is admitted that the present case is not within the letter of the statute, and we think it is not within its spirit; for here the debt of Ashton was voluntarily received in payment. Hammond was not obliged to receive it. We think that General Washington's estate is not bound to make it good, and that the executors may recover from Hammond the difference between Ashton's debt and Hammond's share of the estate.

MORSELL, J., concurred. THRUSTON, J., not having heard the argument, gave no opinion.

A decree was afterwards rendered in conformity with this opinion. Reversed by the Supreme Court, in 1843, 1 Howard, 14.

 United States v. Hancock.

KELLY v. HUFFINGTON.

In slander, the plaintiff is not permitted to prove special damage not stated in the declaration; and the plaintiff may recover, although he shall have failed to prove the special damage laid in his declaration.

SLANDER, in saying of a master of a vessel that he is a drunkard, and incapable of managing a vessel. The declaration stated, as a special damage, that Captain Rose refused to take him as mate of the ship Shenandoah.

The plaintiff offered evidence of special damage, not stated in the declaration.

Mr. Taylor, for the defendant, objected to it, and the COURT, (THRUSTON, J., absent,) sustained the objection.

Mr. Taylor then prayed the Court to instruct the jury, that if they should be of opinion that the plaintiff has not supported the averment of the special damage in the declaration, the plaintiff is not entitled to recover any damages in this action.

But the COURT refused.

 VEITCH et al. v. THE FARMERS BANK OF ALEXANDRIA, Garnishee of Sarah Carter.

A decree in a Chancery attachment, after the expiration of the year and day, must be revived by *scire facias* before execution can be had.

SCIRE FACIAS to revive a decree against the garnishee in a chancery attachment. General demurrer.

Mr. Hewitt, in support of the *scire facias*, cited the Virginia Act of 10 December, 1793, § 53, (p. 306); 3 Tuck. Bl. 414, n. 2; and 1 Har. Ch. Pr. 669.

Judgment for the plaintiffs on the demurrer.

 UNITED STATES v. ANDREW HANCOCK.

In the county of Alexandria, a justice of the peace has no authority to take the recognizance required by the Virginia Act of December 26, 1792, § 23, (p. 183,) in a case of bastardy, unless upon application by an overseer of the poor of the county. *Quære*, whether that section is in force in the county of Alexandria?

THE defendant had been brought before a justice of the peace in the county of Alexandria, as the reputed father of a bastard child, upon the application of the mayor of the town of Alexandria, who is *ex officio* a trustee of the poor-house and work-

Reed v. Minor.

house. The justice required him to enter into a recognizance, with security in the sum of thirty dollars, to appear before this Court, and to abide by and perform the order of the Court, agreeably to the 23d section of the Virginia Act of December 26, 1792.

Mr. Taylor, for the defendant, contended that the Virginia law gives the jurisdiction only to the county court; but this Court derives no jurisdiction from the laws of Virginia, which give jurisdiction to their respective courts.

The Act of Congress of March 3, 1801, [2 Stat. at Large, 115,] enumerates certain powers of the county courts of Virginia, and confers them on this Court, but not this power in cases of bastardy. It is not a criminal case; it is merely a precautionary remedy, to be granted only on the application of the overseers of the poor; it is merely a police regulation, not adopted by the Act of Congress of the 27th February, 1801, [2 Stat. at Large, 103,] because it is not applicable to the circumstances of the county of Alexandria since its separation from Virginia, and cannot be carried into effect here. The recognizance, by the Virginia law, is to the "Governor of Virginia." If the party charged will not give the security required, he is to lay in jail until discharged under the insolvent law of Virginia. If the recognizance is given to the United States, instead of the Governor of Virginia, the party cannot be discharged under the insolvent law of the District of Columbia.

Mr. Swann, attorney of the United States, contended that the public good required that the jurisdiction should be supported; that it is a criminal case, and this Court has a general criminal jurisdiction; that this Court has all the powers of the district courts and the county courts of Virginia; that the Virginia law, if in force here, gives the party the right to a discharge under the insolvent law of the District, although, nominally, the recognizance is to the United States, yet it is for the use of the county. The United States has no interest in it.

The COURT (*nem. con.*) was of opinion that the magistrate could not require the recognizance, unless upon the application of an overseer of the poor of the county.

Recognizance discharged.

E. AND E. REED v. DANIEL MINOR.

An absolute deed of all the household furniture, and all the stock in the shoe business, is fraudulent and void as to creditors, unless the possession *bonâ fide* accompany and follow the deed; but if the goods, at the date of the deed, were actually delivered to the grantees for a valuable consideration, and then taken possession of by one of the grantors, who was *bonâ fide* the known agent of the grantees, and who,

Vowell et al. v. The Columbian Insurance Co.

as such, received and exercised exclusive possession *bonâ fide*, publicly and notoriously, for the sole use and benefit of the grantees, so that the change of possession was notorious and unequivocal, such possession was not inconsistent with the deed, and did not make it fraudulent and void, as to the creditors of the grantors. But if the possession remained with the grantors jointly, although the said agent was one of the grantors, such possession was inconsistent with the exclusive possession of such agent, and was not such a possession as gave effect to the deed, as a valid deed against the creditors of the grantors.

TRESPASS, for levying a *fieri facias* upon the plaintiff's property, for the debt of Silas and David Reed.

The defence was, that the deed from Silas and David Reed to the plaintiffs was fraudulent and void as to the creditors of the said S. and D. Reed.

Upon the prayer of *Mr. Jones* and *Mr. Taylor*, for the defendant, the COURT (MORSELL, J., absent,) instructed the jury, that if the possession of the property remained with the grantors, (the deed being in form absolute, and purporting to convey all the household furniture, and all the stock in the shoe business,) the deed was fraudulent as to the creditors of the grantors.

But the COURT, at the prayer of the plaintiffs, also instructed the jury, that if the goods were delivered to the plaintiffs at the date of the deed, and that the said David Reed was *bonâ fide* their known agent, and, as such, received and exercised exclusive possession *bonâ fide*, publicly and notoriously, for the sole use and benefit of the plaintiffs, so that the change of possession from the grantors to the grantees, or their agent, was notorious and unequivocal, then such possession was not inconsistent with the deed, and did not make it fraudulent and void, as to the creditors of the said Silas and D. Reed.

The COURT, also, at the prayer of the defendant, instructed the jury, in effect, that if the possession remained in Silas and David Reed, such possession was inconsistent with the exclusive possession of David Reed as agent of the plaintiffs, and that such possession, and evidence of agency, are not sufficient to establish such agency and possession in David Reed as to give effect to the sale and delivery contended for by the plaintiffs to support this action.

THOMAS VOWELL, *et al.* v. THE COLUMBIAN INSURANCE COMPANY.

The charges of entering a harbor for repairs, the surveyor's bill, and port-charges, are items of general average, and are the subject of general contribution.

CASE, on policy of schooner *Mary*, valued at \$1500, for six months from the 29th June, 1824.

 United States v. Devaughan.

The question for the Court was whether the charges of entering the harbor to make the repairs, the surveyor's bill, and port-charges, are items of general average, or are a part of the loss, for which the defendants are liable under the policy. Phillips on Insurance, 346, c. 15, § 4.

The COURT (*nem. con.*) was of opinion that those charges were the subject of general contribution.

UNITED STATES v. JONATHAN DEVAUGHAN.

The question which may be asked of a juror when called up to be sworn, is, "Have you formed and delivered any opinion as to the guilt of the prisoner?" If a juror, after being summoned, voluntarily forms and delivers an opinion as to the guilt or innocence of the prisoner, with a view of disqualifying himself for serving on the jury at the trial, it is a contempt of court, inasmuch as it tends to the obstruction of justice.

INDICTMENT for the murder of Tobias Martin, in the county of Washington; the cause having been removed to this county at the request of the prisoner.

Mr. A. C. Casanove, one of the *venire*, was asked by Mr. Hewitt, the prisoner's counsel, whether he had formed an opinion respecting the guilt of the prisoner.

CRANCH, C. J., said he understood the proper question to be, whether he had formed and delivered an opinion as to the guilt of the prisoner upon this indictment; and the question was so put. Mr. Casanove answered that he had. One of the judges asked whether he had so formed and delivered it since he was summoned on the *venire*. He answered in the affirmative. One of the judges then asked him whether he did so with a view to disqualify himself for serving on the jury. His answer was, yes, partly with that view, and certainly with a hope that it would have that effect.

The COURT (*nem. con.*) thought that this conduct of Mr. Casanove, in thus disqualifying himself to serve on the jury, after he had been summoned, was a contempt of court, and ordered him to be fined \$50 for the contempt.

CRANCH, C. J., said, that Mr. A. C. Casanove, one of the jurors summoned upon this *venire*, having stated to the Court, that since he was summoned as a juror in this cause, he has formed and delivered an opinion as to the guilt of the prisoner in this cause, partly with a view to disqualify himself for serving as a juror in the cause, and with the hope that it would have that effect; The COURT is of opinion that Mr. Casanove's conduct,

in that respect, was a contempt of Court, and that he be fined \$50. That the Court did not suppose Mr. Casanove intended any contempt to the judges personally, nor to the Court simply as a court, but that as it tended to the obstruction of justice, the Court deemed it necessary to take this notice of it, reserving to itself the right to mitigate the fine, or to rescind the order upon any proper representation which may hereafter be made by Mr. Casanove, upon the subject.

Mr. Casanove was then rejected as a juror. Several of the other jurors, having formed and delivered opinions against the prisoner before they were summoned, were discharged.

The case of Aaron Burr was cited, in which case it appears that the question put to the jurors was, whether they had formed and delivered an opinion, &c.

The evidence was very clear against the prisoner; he was convicted; sentenced, on the 5th of May, 1827, to be hung on the last Wednesday in June, and executed in the county of Alexandria.

ZENAS KINSEY v. EZRA KINSEY's executors *et al.*

A devise to Zenas Kinsey or his heirs, is a devise to him and his heirs; and a proviso that one of the devisee's sons should have a double portion more than his other children, takes effect only in case of the death of the devisee in the lifetime of the testator.

THIS was an amicable bill filed to settle the construction of the will of Ezra Kinsey. The following is the clause in question:—

“I give and bequeathe the whole rest and residue of my estate, either real or personal, and of share of stock in trade, and every thing I am possessed of, to Zenas Kinsey or his heirs; N. B. Ezra Kinsey is to have a double portion of my estate more than Zenas Kinsey's other children. He is to have my silver watch. Zenas Kinsey is to pay his mother, Dorothy Kinsey, \$50 yearly during her lifetime; and he is to pay Mary Shaw \$50 yearly during her natural lifetime.”

Mr. Taylor, for the complainant, cited *Crooke v. De Vandes*, 9 Ves. 197.

The opinion of the Court was, that the testator meant, in effect to say, “I devise the whole of my estate real and personal to Zenas Kinsey and his heirs; but if he should die before me, I devise the same to such of his children as shall be living at my decease; Ezra, however, to have a double portion and my silver watch.”

THRUSTON, J., not having been present at the argument, gave no opinion.

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Ex parte. TENCH RINGGOLD, Marshal of the District of Columbia.

The Orphans' Court for the county of Alexandria has no authority to order the marshal of the District of Columbia to administer the estate of any deceased person; nor is the marshal bound to obey any such order.

He is not a county or corporation officer.

He has the powers of a sheriff in executing the laws of the United States, but is not bound to perform all the duties of a sheriff under the State laws.

The powers and duties of the judge of the Orphans' Court for Alexandria county are limited by the laws of Maryland, as they existed on the 27th of February, 1801, not by the laws of Virginia.

THIS was an appeal from the Orphans' Court for the county of Alexandria. The following is the whole of the record which came up from that Court:—

“Orphans' Court, Alexandria, June Term, 1825.

“Ordered that the marshal of the District of Columbia do take into his possession the whole estate of Robert Young, deceased, and make sale of so much thereof by public auction as the payment of debts shall make necessary; or as shall be perishable; or be directed by his last will and testament, if any there be, to be sold; and he is further ordered to sue, if necessary, for the recovery of debts due to the said estate, or of goods and chattels; and to make a true and perfect inventory of the whole of said estate, and an account of sales thereof; and to return the same together with the bonds taken by him from purchasers, to this Court. A copy. Teste, A. Moore, Reg. Wills.

“At a session of the Orphans' Court for the county of Alexandria, in the District of Columbia, the 7th day of December, 1825, the marshal of the District of Columbia appealed from the above order of the court, to the Circuit Court of the District of Columbia for the county of Alexandria. A. Moore, Reg. Wills.”

CRANCH, C. J., delivered the opinion of the Court.

This order is supposed to have been made under the Act of Virginia, December 13, 1792, § 61, p. 167, which provides that if all the executors shall refuse, &c., or, in case of an intestate estate, if no person will apply for administration, “it shall be lawful for the general court, or other court having jurisdiction of such *probat* or administration, after the expiration of three months from the death of the testator or intestate, to order the sheriff or other officer of the county or corporation to take the estate into his possession and make sale of so much thereof, at public auction, as the payment of debts shall make necessary; or as shall be perishable, or be directed by will, to be sold; and all sales and conveyances *bonâ fide* made by the sheriff or his deputies, or other officer, in consequence of such order, shall be as effectual to the purchasers as if they had been made by the testator in

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his lifetime. 'The estate shall be sold upon such credit as the Court shall direct, and upon public notice previously given; the purchasers giving bond and good security for payment according to the limited time of credit.'

He is also authorized to sue for debts or property due to the deceased, and required to return to the court an inventory and account of sales, and the bonds taken from purchasers &c.

Without inquiring whether the marshal is bound to obey the order of the Orphans' Court, if made in a case within the terms of the Act of Virginia, it may be observed that it does not appear in the record that Robert Young died in the county of Alexandria, or left any estate therein; nor whether he died testate or intestate; nor, if testate, that all the executors refused to act or to give bond; nor if intestate, that no person had applied for administration; nor that three months had expired since the death of Mr. Young; all which facts ought to have been ascertained before the order could be regularly made. We think, therefore, that the sentence of the Orphans' Court might be reversed upon that ground. But as it is understood that the parties concerned wish to obtain the opinion of the Court upon the question whether the marshal is bound to obey such an order in any case which can be made under the Act of Virginia, we are willing to consider that question.

The first objection to the order, is, that the marshal is not a county or corporation officer, but the officer of the whole district; and the Orphans' Court could only make the order to some officer of the county or corporation. This seems to us to be a valid objection. It is not a duty devolved upon the sheriff of any county, as such. He is only designated as one of the officers whom the court may, under the Act of Virginia, order to make the sale; but the court may appoint any other officer of the county, or even of the corporation.

It is said that the marshal is bound to perform, in the respective counties of this district, all the duties which the sheriffs in Virginia and Maryland, respectively, were bound to perform in their respective counties on the 27th of February, 1801, when the jurisdiction of those States ceased over this district; and that the laws of Virginia, then in force in the county of Fairfax, continued to be in force in the county of Alexandria. It is said also that there are certain fees, given to the sheriff in Virginia, which the marshal has claimed here, and which he can only claim by identifying himself with the sheriff; and that he has been in the habit of performing certain duties which he could not perform, nor be compelled to perform unless by a similar identification. That by the first section of the Act of Congress

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of March 3d, 1801, [2 Stat. at Large, 115,] officers "for whom no special provision is made" by that act, or the Act of February 27th, 1801, [2 Stat. at Large, 103,] "shall receive the same fees and emoluments as they have respectively received under the jurisdiction of the respective states;" and it is intimated that the marshal, under that clause of the act, charges, for summoning a coroner's jury, by order of the coroner, the same fee as the sheriff of Virginia does. But that clause of the act does not affect the marshal because he is an officer "for whom special provision is made" by the Act of February 27th, 1801, § 9. (2 Stat. at Large, 103.)

By the Virginia law of November 29th, 1792, Rev. Code, § 6, p. 125, the coroner is to issue his precept to the sheriff, sergeant of a corporation, or constable of the county or corporation, directing him to summon at least twelve freeholders," &c.

If the marshal has executed such precepts, it does not follow that he was bound to do so, nor that he could lawfully demand fees for executing them.

By the Act of Congress of March 3, 1807, [2 Stat. at Large, 430,] the marshal is entitled to receive "for such services" in Alexandria county, "as are not enumerated in that, or some other act of Congress, the like fees as by the laws of Virginia, prior to the first Monday in December 1800, were allowed to a sheriff of a county for like services."

By this act, he receives his fees, not because he is identified with the sheriff of Virginia, but because the act gives him, as marshal, the like fees as a sheriff in Virginia would have received for like services. There is no act of Congress which declares that he shall perform all the duties required of a sheriff under the laws of Virginia.

It is said also that the marshal executes the process of the Orphans' Court, and charges the fees allowed, by the laws of the States, to the sheriffs. These fees he is entitled to receive under the Act of March 3, 1801, [2 Stat. at Large, 115,] or the Act of February 27, 1801, [2 Stat. at Large, 103.]

By the Judiciary Act of September 24, 1789, § 27, [1 Stat. at Large, 73,] it is the duty of the marshal "to execute, throughout the district, all lawful precepts, directed to him, and issued under the authority of the United States.

Whatever process he executes, or whatever fees he receives, he executes and receives as marshal, and under the authority of the United States.

By the seventh section of the Act of Congress of February 27, 1801, "concerning the District of Columbia" it is enacted, "That there shall be a marshal for the said district, who shall

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have the custody of the jails of the said counties, and be accountable for the safe-keeping of all prisoners legally committed therein; and he shall be appointed for the same term, shall take the same oath, give a bond with sureties in the same manner, shall have, generally, within the said district, the same powers, and perform the same duties, as is by law directed and provided in the case of marshals of the United States. And by the ninth section of the same act, he was entitled to receive, for his services, the same fees which were by law allowed to the marshal of the district of Maryland.

By the twenty-seventh section of the Judiciary Act of September 24, 1789, the duties of a marshal are thus described:—"Whose duty it shall be to attend the District and Circuit Courts, when sitting therein, and also the Supreme Court in the district in which that court shall sit; and to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty; and to appoint, as there shall be occasion, one or more deputies," &c., "and shall take the following oath of office: 'I A. B. do solemnly swear, or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of — under the authority of the United States, and true returns make; and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal of the district of — during my continuance in said office, and take only my lawful fees, so help me God.'"

By the twenty-eighth section of the same act he has power, notwithstanding his removal from office, to execute all precepts then in his hands; and is bound to deliver over all prisoners to his successor.

By the third section of the Act of Congress of February 28, 1799, [1 Stat. at Large, 624,] his fees for certain services are regulated; and "for all other services not herein enumerated he is to receive such fees or compensation as are allowed in the Supreme Court of the State where the services shall be rendered."

By the fourth section of the Act of May 8, 1792, [1 Stat. at Large, 277,] he is to have the custody of vessels and goods seized by officers of the revenue; to pay the contingent expenses of holding courts, and of criminal prosecutions; and by the seventh section he is liable to fine and imprisonment for taking unlawful fees.

By the Act of February 28, 1795, seventh and eighth sections, [1 Stat. at Large, 425,] he is to collect the fines imposed by certain militia courts-martial; and by the ninth section, it is en-

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acted, "That the marshals of the several districts and their deputies shall have the same powers, in executing the laws of the United States, as sheriffs and their deputies in the several States have, by law, in executing the laws of the respective States."

By the eighth section of the Act of March 2, 1793, [1 Stat. at Large, 333,] he is to cause appraisement to be made of goods taken in execution, if such appraisement be required by the State laws.

By the act of February 27, 1801, [2 Stat. at Large, 103,] the laws of Virginia, as they then existed, were continued in force in the county of Alexandria. Among these is the Act of Virginia before recited, which authorizes any court, having jurisdiction of *probat* and administration, to order a county officer to sell the estate of deceased persons in certain cases. If we should admit, that, by that act, the duty devolved on the sheriff of a county, as sheriff, yet we can find no law that imposes it on the marshal of a district including two counties. But it does not devolve on the sheriff as such. He is only designated as one of the county officers upon whom the court may impose the duty.

But by the twelfth section of the Act of February 27, 1801, [1 Stat. at Large, 103,] the powers and duties of the judge of the Orphans' Court for the county of Alexandria, are limited by the laws of Maryland; not by the laws of Virginia. No such power to compel the sheriff to administer, is given by the laws of Maryland.

If the marshal be not identified with the sheriff, it is said, he may take bond, from persons in his custody, for matters relating to his office, otherwise payable, than to himself as marshal, and for the appearance of the prisoner, and that such bond will not be void under the statute of 23 Hen. 6, c. 9. This may be so, and if there be no law that prevents other marshals from taking such bonds, we conclude that it is so. His powers and duties are limited by the general laws of the United States, respecting the powers and duties of marshals, unless enlarged by particular acts of Congress. If other marshals may take such bonds we see no law to prevent him from taking them.

It is also said that if the marshal be not identified with the sheriff, he may take more than legal fees, contrary to the Virginia Act of November 23, 1791, § 18. He cannot impress guards for the jail, under the twenty-third section of the same act. He cannot claim a summary remedy against his deputy, under the twenty-fifth section of the same act. He is not liable to the penalty prescribed by the eleventh section of the Virginia Act of December 10, 1793, for not indorsing upon an execution

 Garey v. The Union Bank of Georgetown.

the time of receiving it. He is not bound by the laws respecting the manner of executing process, and writs of execution, and the taking of forthcoming bonds, &c.

But however these matters may be, we are satisfied that the judge of the Orphans' Court in Alexandria, has no power under the law of Virginia, to compel any person to administer upon an estate contrary to his will; and if he had, he cannot compel the marshal of this district to do it. We think, therefore, that the sentence of the Orphans' Court must be reversed.

Sentence reversed.

 GAREY v. THE UNION BANK OF GEORGETOWN.¹

A "county commissioner," in the State of Illinois, is not authorized to take depositions under the Judiciary Act of September 24, 1789, § 30, to be used in the courts of the United States.

IN EQUITY.

Mr. Taylor, for the defendants, objected to a deposition, purporting to be taken *de bene esse* under the thirtieth section of the judiciary act of 1789, which authorizes such depositions to be taken "before any justice or judge of any of the courts of the United States; or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city; or judge of a county court, or court of common pleas of any of the United States."

The deposition was taken before a county commissioner of the State of Illinois, who is a judge of the County Commissioners' Court, which is a court of record composed of three judges, called county commissioners, who are elected by the people and hold their offices for the term of two years. They hold four sessions a year, and their jurisdiction extends to all matter concerning the county revenue, and the county tax. They grant licenses for ferries and taverns, and other licenses. They have jurisdiction in all cases of roads, canals, toll-bridges, and many other cases appertaining to county government and police; and have power to issue all kinds of writs and processes necessary to the execution of their jurisdiction. 3 Griffith's Law Register, 412.

The COURT (*nem. con.*) rejected the deposition, being of opinion that the County Commissioners' Court was not one of the courts described in the Act of Congress of September 24, 1789, § 30, [1 Stat. at Large, 73.]

¹ This case was decided in December Term, 1826.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1827, AT WASHINGTON.

ANN DERMOTT *v.* SUSAN TUCKER.

Upon a parol lease for one year at \$600 per annum and an occupation for two or more years, the plaintiff may recover for the whole time of occupation at that rate, upon a count upon *indebitatus assumpsit* for \$1000, although the use and occupation were not worth so much.

INDEBITATUS ASSUMPSIT for \$1000 for use and occupation, and *quantum meruit* for use and occupation.

The plaintiff offered evidence of a parol agreement for a year at \$600 per annum, and an occupation of two years, and prayed the Court to instruct the jury that if they should be satisfied by the evidence that there was such agreement and occupation, the plaintiff was entitled to recover upon the count of *indebitatus assumpsit* for \$1000, damages at the rate agreed upon for the actual time of occupation, although they should be satisfied by the evidence that the use and occupation were not worth so much.

Which instruction the COURT gave, (*nem. con.*)

Verdict for the plaintiff \$200.

THOMAS L. MITCHELL *v.* WILLIAM WILSON.

If the defendant in replevin does not appear at the return of the writ, and the plaintiff takes no step to obtain an appearance at that term; the cause is discontinued, and the clerk will not bring it forward upon the docket of the next term, and the Court will not reinstate the cause at the subsequent term, although the defendant's attorney make affidavit that he was employed by the defendant to appear for him at the preceding term, and promised and intended so to do, and thought he had done so, but finds his appearance was not entered, and presumes it was because he had forgotten to give the order to the clerk; and although the defendant make oath that, before the sitting of the last court he went to the clerk's office, and informed one of the clerks that he should defend the said suit, and that Mr. Key was his attorney.

After the discontinuance of the replevin, the goods are no longer in the custody of the law, and the defendant is not guilty of a contempt in taking possession of them.

REPLEVIN for a negro woman named Mahala.

North's Administrators v. Clark.

The defendant did not appear at the last term, (to which term the writ was returnable,) and the plaintiff took no step to obtain an appearance; no continuance was entered or ordered, and the clerk did not bring the cause forward upon the docket of this term, considering it as discontinued; and of that opinion was the COURT, (THRUSTON, J., absent.) It did not appear to be the misprision of the clerk. The Court had decided the point in some previous cases.

Mr. Key moved the Court to reinstate the cause and to order it to be brought forward upon the docket of the present term, and made affidavit that he was employed by the defendant to appear for him in the suit, at the last term, and promised, and intended to do so, and thought he had done so, but finds that his appearance was not entered; and presumes it arose from his forgetting to give the order to the clerk. The defendant *Wilson* also made affidavit that before the sitting of the last court, he went to the clerk's office and informed one of the clerks that he should defend the said suit and that *Mr. Key* was his attorney.

But the COURT (THRUSTON, J., absent,) refused to reinstate the cause.

Mr. Cox, for the plaintiff, moved for an attachment of contempt against the defendant, for having since the last term taken possession of the replevied goods.

But the COURT refused; being of opinion that when the action of replevin was discontinued, the goods were no longer in the custody of the law.

NORTH'S ADMINISTRATORS v. CLARK.

The plaintiff is bound to give oyer of his letters of administration whenever demanded before the expiration of the rule to plead.

At the last term, *Mr. Wallach*, for the plaintiffs, suggested the death of North, and, in open court, directed the appearance of the administrators to be entered, which was done. Afterwards, at the same term, *Mr. Morfit*, for the defendant, prayed oyer of the letters of administration, and pleaded that the plaintiffs never were administrators. At this term, *Mr. Wallach* objected to the plea, saying that it was too late, after the plaintiffs had been permitted to appear, and relied on the case of *Wilson v. Codman*, 3 Cranch, 193.

CRANCH, C. J., delivered the opinion of the Court. In the case of *Wilson v. Codman*, Marshall, C. J., in delivering the opinion of the court, says: — "They (the words of the Judiciary

Act of 1789,) [1 Stat. at Large, 73,] contemplate the coming in of the executor as a voluntary act. From the language of the act, this may be done instanter. Unquestionably he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute. But if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor. If the court has unguardedly permitted a person to prosecute, who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means."

Those means, we suppose, are to strike out the appearance of the plaintiff, upon motion made during the same term, and to permit the defendant to pray oyer of the letters of administration, and plead that the plaintiff is not administrator. This plea he has a right to plead, and it is a good plea in bar, and not in abatement. 1 Saund. 274, n. 3; 1 Chitty's Pleadings, 484.

We think the plaintiff is bound to give oyer of his letters of administration, whenever demanded, before the expiration of the rule to plead, notwithstanding the *dictum* in *Roberts v. Archer*, 2 Salk. 497, where it is said that, "upon the profert of a deed, it remains in court all that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court; for the party may have occasion to produce them elsewhere."

We know of no rule which requires oyer to be prayed for before the defendant is bound to plead.

The rule day is substituted for a day in the term, and, we think, is to be considered as a day in the term. In the present case, however, the defendant did not wait for the rule to plead, but prayed oyer almost instanter. We think his plea is in due time, and ought to be received.



THE BANK OF THE UNITED STATES v. ABBOTT.

After demand and notice to the indorser, the plaintiff may agree to give time to the maker of the note, without discharging the indorser.

The testimony of the notary, that he demanded of the maker payment of the note on the third day of grace, and gave notice to the indorser of the non-payment on the third and also on the fourth day, is competent evidence of demand and notice, although the witness does not recollect the day of the month on which such demand was made and such notice given.

ASSUMPSIT against the indorser of Rind's promissory note.

Mr. J. Dunlop, for the defendant, prayed the Court to instruct the jury, that if they should find, from the evidence, that the bank, after the demand and notice to the defendant, agreed to give time to the maker, who had previously given a deed of trust to secure the bank, the defendant was discharged from his liability; which instruction the COURT (THRUSTON, J., *contrà*,) refused to give.

The witness, Brooke Mackall, the notary, testified that he made the demand on the third day of grace, and gave notice to the indorser on the third, and also on the next day thereafter; but on cross-examination said he could not recollect the days of the month and year, without reference to his notarial book, which was in the hands of the plaintiffs, and was not in Court, or to certain copies from that book, which were in the hands of the plaintiffs' counsel; but he testified positively that he had a distinct recollection, independently of his book, that it was on the third and fourth days of grace.

Mr. Dunlop moved the Court to instruct the jury, that the testimony of Mr. Mackall was not competent evidence of demand and notice; which instruction the COURT (THRUSTON, J., *contrà*,) refused to give.

Verdict for plaintiff, \$2563.



CLEMENT T. COOTE AND RAPHAEL JONES, for the use of Raphael Jones, v. THE BANK OF THE UNITED STATES.

It is not a good ground for a new trial, that the defendants (a banking company,) had in their possession documents of which they did not avail themselves, because they were not known to one of the officers of the defendants at the time of trial.

Primâ facie the bank had no right to charge up to the account of a firm, the individual note of one of the partners; and the burden of proof lies on the bank, to show the assent of the other partner.

One partner has no right to draw the joint funds in his own name; nor can he lawfully appropriate them to his own use. He has only a right to use the joint name, and to act as and for the firm.

When books have been called for by the opposite party, and produced, it is competent for the party producing them to show, by the testimony of a witness, that he has examined the books, and that they do not contain any entries upon or relating to the matter in controversy; the books themselves being in court for the inspection of the opposite party.

In this cause, at the last term, the plaintiffs obtained a verdict for \$500, and the defendants moved for a new trial: 1st. Because the verdict was contrary to evidence; 2d. Because new evidence had been discovered; and, 3d. Because the court erred in refusing the instructions moved for by the defendants' counsel.

Upon the third ground, *Mr. Lear*, for the defendant, cited *Swann v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Wood v. Braddick*, 1 Taunt. 104; 1 Montagu, 31; Gow, 59, 67; *Dobb v. Halsey*, 16 Johns. 38; *Henderson and Smith v. Wild*, 2 Camp. 561.

Mr. Jones, *contra*, cited Montagu, 134; *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 Esp. 122; Gow, 59.

Mr. Key, in reply, contended that one partner has a right to draw the joint funds, even for his own use, unless there be collusion between him and the party drawn upon.

CRANCH, C. J., delivered the opinion of the Court. This is a motion for a new trial, in an action for money paid, laid out, and expended by the plaintiffs for the defendants; and for money had and received by the defendants for the use of the plaintiffs.

The reasons alleged for a new trial are: 1st. Because the verdict is against evidence; 2d. Because new evidence has been discovered since the verdict; 3d. Misdirection of the jury by the court in matter of law.

1. The first reason has not been relied upon by the defendants' counsel.

2. The supposed newly-discovered evidence is this, that on the defendants' scratch-book, which is the original book of entry of deposits made in the bank, three sums, amounting to about \$1000, were, at three several times in January, September, and October, 1818, entered in the name of Clement T. Coote, and were posted in the ledger to the credit of Clement T. Coote & Co.

This evidence was in the power of the defendants at the trial; and the ignorance of one of the officers of the bank, who was not the bookkeeper, is not sufficient ground for a new trial. If it were, there could never be an end of new trials. The bank could obtain them whenever they should desire; for it is hardly probable that there should not be found, some one of the numerous officers of that bank who was, at the time of the trial, ignorant of some fact which might be material in the cause.

But the evidence itself seems to be wholly unimportant; for the posting it to the credit of Coote & Co. is evidence that the officers of the bank understood it as being originally deposited to the credit of that company.

3. The principal ground relied upon by the defendants, in support of their motion for a new trial, is, that the court refused to instruct the jury as prayed by their counsel.

It appeared in evidence that the bank held a deposit to the credit of the firm of Clement T. Coote & Co., to the amount of

\$500, which was money had and received by the bank for the use of the plaintiffs, and which they have a right to recover in this action, unless the bank have a right to charge them with the individual note of C. T. Coote, one of the plaintiffs, dated 21st September, 1818, for \$200, payable 23d of November, 1818, and his individual check for \$300, dated 29th September, 1818.

The entries of these debits in the bank-book of Clement T. Coote & Co., kept at the bank, appear to be post-entries, interpolated and crowded in between other entries previously made. The check for \$300 appears to have been given to take up C. T. Coote's individual note for that amount, previously discounted at the bank for his accommodation. The individual note of C. T. Coote, for \$200, was charged up in the joint account of Coote & Co.

Primâ facie, the bank had no right to charge the note and check to that account, any more than they would have had to offset them against the joint demand of Coote & Co., if they had brought suit against the bank.

The burden of proof was on the bank, to show the assent of the other partner, or that the transaction was for joint account and benefit.

One partner has no right to draw the joint funds in his own name; he cannot lawfully appropriate the joint funds to his own use; he has only the right to use the joint name, and to act as and for the firm. When he receives joint goods, he receives them in the name of the firm. If he gives a receipt for them, he signs the name of the firm; if he verbally direct a payment to be made out of the joint funds, he does it in the name of the firm, and as representing the firm. His right, as a partner, is only to represent the firm, and to act in the name of the firm; as an individual, he has no authority over the partnership effects. If he act avowedly in his individual character, everybody knows that he cannot bind the firm; and every person who deals with him, ostensibly in his individual character, if he would charge the firm with his acts, must take upon himself the burden of proving that, notwithstanding appearances to the contrary, he was acting for and on behalf of the firm, and for their account and benefit.

In the present case, the bank did undertake the burden of that proof; and, for that purpose, introduced Mr. Weightman, an officer of the bank, who testified that during the partnership, and while the joint funds were in the bank, to the credit of the firm, a note signed by C. T. Coote, in his own name only, fell due at the bank, and as Coote had no funds nor account there,

then, nor at the time when the entries of September 29, 1818, and November 23, 1818, were made in the bank-book of C. T. Coote & Co., the witness called on Mr. Coote, to know how the note was to be paid; who said it was a partnership transaction, and that he intended the note to be paid out of the joint funds in the bank, and directed the witness so to do. That he had intended to put the partnership name to the note, but had, by mistake, put his own name only. That he might draw notes or checks in the same way again, that is, on partnership account, but in his own name only, by mistake, instead of that of the firm; but that if he should have no funds in the bank in his own name, as he should in all such cases draw such checks or notes on partnership account, and intending them to be paid out of the partnership funds, he would thank the witness and the gentlemen of the bank to pay them out of the funds of the concern; as they might, in such cases, take it for granted that they were drawn on partnership account.

Upon which evidence the defendants prayed the court to instruct the jury, in substance, that if they believed, from the said evidence, that Mr. Coote, at the time or before the said note and check were drawn, informed Mr. Weightman as above stated, then the plaintiffs are not entitled to recover, unless they can satisfy the jury that Mr. Coote drew the said note and check on his own account, and not on partnership account, and that the defendants or their officers knew, or had sufficient cause to know, that he so drew them; which instruction the court refused to give.

The question is, whether this testimony of Mr. Weightman shifted the burden of proof from the defendants to the plaintiffs. We think it did not.

The presumption arising from that testimony, that it was really and *bonâ fide* a joint transaction, is not, in our opinion, as strong as the presumption arising from the signature, and other circumstances stated in the evidence, that it was the individual transaction of Mr. Coote. And the instruction which the court ought to have given, if they had given any, should have been, that, upon that evidence, the plaintiffs had a right to recover, unless the jury should be satisfied by the evidence, that the note and check were really drawn for the joint account.

All the cases cited are where the joint name was used, or where it was equivocal whether it were used or not. That circumstance throws the burden of proof on the party who wishes to show it to be the individual transaction of the partner who used the joint name. If the note and check, in the present case, had been drawn in the name of Clement T. Coote & Co., all

these cases would have been applicable. Each partner has a right to use the name of the firm; and if he does, it is an act within the scope of his authority, and the transaction is *primâ facie* joint; and it is probable that a mere knowledge, that it is used for the individual benefit of one of the partners, is not sufficient, without collusion, to prevent it from binding the other partner. But when the name of the firm is not used, it will require strong evidence to rebut the presumption that it is an individual transaction.

In the present case, the evidence is that the partner, whose individual note was taken up by this check, informed an officer of the bank, in conversation respecting another note, at some time, whether before or after the payment of this check does not appear, but perhaps before, that that note was a partnership transaction, although signed, by mistake, with his own name only, and was to be paid out of the joint funds in the bank; and that as he might again, by mistake, draw similar notes or checks in his own name only, he would thank the officers of the bank to pay them out of the joint funds, if he should then have no funds in bank in his own name; as they might, in such cases, take it for granted that they were drawn on partnership account.

The question is not, whether the bank had confidence in the representations of the party who was seeking to pay what appeared *primâ facie* to be his individual debt out of the joint fund; for we take it that, in order to justify the bank in charging the other partner with this check, it must have been in fact drawn for a partnership purpose; and the bank, in the face of the written evidence of its being an individual transaction, takes upon itself the risk of proving it to be so, in a contest with the other partner, by other evidence than the declaration of the party to be benefited by the payment of the check.

Partners run risk enough, by the authority of each to use the name of the firm, without charging them, except upon decisive evidence, in cases where the name of the firm is not used. In this case, the evidence is of the slightest kind. It is only the declaration of the individual partner, who drew the check, that he might, by mistake, draw a check or note in his own name, instead of that of the firm; and that in such case, that is, where it was so drawn by mistake, the bank might presume it was a joint transaction. And from this evidence the jury was to be asked to presume that this check was drawn, by mistake, in the name of C. T. Coote only; and that it was, in fact, a joint transaction, in spite of the presumption arising from the facts, that it appeared upon its face to be an individual transaction;

that it was given to take up a note drawn in the individual name of Mr. Coote, and discounted by the defendants, and the proceeds of the discount never carried to the credit of C. T. Coote & Co. in the books of the defendants.

We think the Court did right in refusing the instruction prayed by the defendants. The Court gave no instruction to the jury on that point. The jury were left to draw their own inferences.

In the case of *Swann v. Steele*, 7 East, 210, the name of the firm was used. So also in the case of *Ridley v. Taylor*, 13 East, 175. In *Wood v. Braddick*, 1 Taunt. 103, the letter of Cox, one of the partners, written after the dissolution was admitted in evidence, in an action against Braddick, the other partner, merely to prove the receipt of the goods by Cox, and the amount of the debt. The fact that it was a partnership transaction seems to have been proved by other evidence. Whatever, therefore, was said by the judges in that case, (which does not seem to have been very solemnly considered,) so far as relates to the question whether the declarations of Cox could be given in evidence against Braddick to prove that the goods were consigned to Cox, or received by him on the joint account, is a mere *dictum*; and that, directly contrary to the opinion of Lord Alvanley in the case of *Petherick v. Turner*, cited by the defendant's counsel; contrary, also, to the decision of the Supreme Court of New York, in the case of *Walden v. Sherburne*, 15 Johns. 409; and in the case of *Hackley v. Patrick*, 3 Johns. 536. And in all the other cases cited from Montague, 31, and Gow, 59 and 67, the name of the firm was used; and it is in such cases only that it is necessary for the contending partner to prove collusion in the creditor.

In page 60, Gow says, "In the hands of a person aware of, and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction without their consent, the joint security would not be available. In such a case it would be the same as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority so to do; if he had such authority the pledge would be good; but the creditor would take it at the peril of proving that authority, if it were afterwards denied. The power possessed by one partner, of binding his co-partners in joint transactions without their knowledge or consent, bears, in many instances, sufficiently hard upon partners; but it would be carrying their liability for each other's acts to a most unjust extent, if it were suffered that in a separate transaction one partner could pledge the credit of the firm."

The Potomac Company v. The Union Bank of Georgetown.

It has been suggested, that Coote was the agent of the firm, and that his acts, as agent, bind the firm. But an agent can only bind his principal when acting within the scope of his authority, and his authority, in this case, cannot exceed his authority as partner; for it is only because he is said to be the acting partner that he is averred to be the agent of the firm. If he had any greater power it has not been shown. One partner has no authority to bind the firm for his own debt, even by the use of the joint name; and *a fortiori*, by the use of his own name; and his own declaration that it was a joint transaction, if such declaration had been sufficiently proved, is not evidence of that fact against the other partner.

But it is said that the books of the copartnership were made evidence by being called for and examined by the defendants, and it is objected that the Court suffered a witness to testify that he had examined the books, then in court, and lying before him, and that he could find no entry in them respecting the note and check which were the subject of controversy. The testimony of that witness is said to have been improper, and that the admission of it is ground for a new trial.

But if the testimony were immaterial, or only in corroboration of other evidence to the same point which the court should deem to have been sufficiently established without that testimony, the court ought not to grant a new trial on that ground.

As the books themselves were given in evidence and were then in court, it was sufficient for the plaintiffs to have averred that no such entry could be found in them; and the jury must, and, no doubt, would have presumed that fact, which, if not true, it was in the power of the defendants to show to be false by the books themselves. The averment made by a disinterested witness surely should not be of less avail than the averment made by a plaintiff himself. The testimony therefore was unimportant.

New trial refused by the COURT, (*nem. con.*) but THRUSTON, J. doubting.

THE POTOMAC COMPANY v. THE UNION BANK OF GEORGETOWN.

After the plaintiff has received the principal debt, he cannot recover the interest in an action for principal and interest.

ASSUMPSIT for money had and received.

The defendants had refused to pay money deposited by the plaintiffs, whereby the defendants had incurred the penalty of twelve per cent. interest for 106 days, at the end of which period

they paid the actual sum deposited with simple interest at six per cent. The balance claimed was \$210.49. But before the defendants paid the deposit, the plaintiffs brought suit for the whole deposit, with twelve per cent. interest. The defendants refused to pay the twelve per cent., but paid the principal, which the plaintiffs received.

R. S. Coxe, for the defendants, cited *Tillotson v. Preston*, 3 Johns. 229, and prayed the Court to instruct the jury that if they should be satisfied, by the evidence, that the payment was made by the defendants, as and for the principal, the plaintiffs cannot recover the interest in this form of action.

Mr. Jones, and *Mr. Key*, for the plaintiffs, admitted this to be the rule of law, and the COURT gave no opinion.

By the Act of Congress of March 2, 1821, [3 Stat. at Large, 618,] "to extend the charters of certain banks in the District of Columbia," if the bank refuses to pay a deposit, on demand, the depositor is "entitled to receive and recover interest on the same at the rate of twelve per cent. per annum."

BLUE v. RUSSELL.

A note payable in twelve months "with interest" will not support a count upon a note payable in twelve months without interest. The plaintiff was permitted to strike out his own indorsement of the note, after it had been offered in evidence to the jury and objected to, on account of such indorsement.

ASSUMPSIT upon the defendant's promissory note, payable in twelve months with interest. The declaration omitted the words "with interest."

The COURT decided the variance to be fatal; there being only one count, namely, on the note.

A juror being withdrawn the plaintiff had leave to amend his declaration, and the Court refused to continue the cause.

The note had upon its back the blank indorsement of the plaintiff (who was the payee) and of another person.

Mr. Barrell, for the plaintiff, was permitted, after offering the note in evidence, and after objection to its going to the jury on account of the indorsement of the plaintiff, to strike out the indorsements.

CRANCH, C. J. doubting.

Verdict for plaintiff, \$1700.

CLEMENT LETOURNO v. TENCH RINGGOLD.

A deed conveying, in trust, to secure certain creditors, certain specified articles of personal property, does not protect from the general creditors, articles purchased to supply the place of articles sold by the trustee; unless so stipulated in the deed of trust.

REPLEVIN, for goods taken in execution by the defendant, as marshal of the District of Columbia, at the suit of a creditor of Joseph Letourno.

Joseph, the debtor, was also indebted to his brother Clement, the plaintiff in this cause; and to secure that debt, conveyed to one Elijah White, by a deed of bargain and sale, dated on the 25th of February, 1825, all his household furniture and stock in trade, as a tavern-keeper, (a particular schedule of which was annexed to the deed,) in trust to permit Joseph to remain in possession and to use them until the execution of the trust; and providing that White should preserve the property for the purpose of securing the payment of \$1363.50 due to Clement Letourno, the plaintiff, within a year from the date of the deed; after which he was, on demand, to deliver up the property to Clement, to be sold in discharge of that debt, if it should not have been before paid.

And by a second deed, dated October 18, 1825, reciting that part of the goods, mentioned in the schedule, had been sold and other goods substituted, conveyed to the said White upon the same trusts, the goods, stock in trade, &c., then in the house, (other than those contained in the schedule annexed to the former deed;) and also such as might thereafter, before the extinguishment of the debt to Clement, "be purchased or procured out of the profits or proceeds of the same, or for the purpose of replacing any of the goods, wares, merchandise, stock in trade, furniture, or other articles now in the house; or for carrying on the business of the said Joseph Letourno."

The defendant's counsel prayed the Court to instruct the jury, that the deed did not convey the after-acquired property.

But the COURT instructed the jury that the deed of the 18th of October, if not otherwise fraudulent, protected the goods purchased, since the date of the last deed, out of the profits or proceeds of the goods which had been acquired between the dates of the two deeds; but not such as may have been purchased since the date of the last deed, out of the proceeds or profits of the goods conveyed by the first deed, and sold since the date of the last deed. See the case of *Wagner v. Watts*, at June term, 1819, in this Court, (2 CRANCH C. C. 169.)

Verdict for the defendant.

WINTER AND BOWMAN, survivors of Joshua Bowman, v. JOHN W. SIMONTON.

An agreement to hire a vessel, "from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade for the space of twelve months, at and after the rate of \$425 a month, — \$600 to be paid on the arrival of the brig at Havana," the owners covenanting "that the said brig shall be tight, stiff, staunch, and strong, well victualled and manned at their own expense, during that period, the dangers of the sea only excepted" — the hirer paying "all port-charges and pilotage at every place" to which she may go, is not a contract of freight.

With regard to the destination and loading of the vessel, the hirer is owner *pro hac vice*.

The general owner is not bound to see that the master performs the voyages indicated by the hirer; the master and mariners being, in that respect, subject to the order and control of the hirer.

In an action for the hire of a vessel according to the terms of a sealed agreement, the defendant, by pleading, "that he had paid to the plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect of the said articles of agreement," assumes upon himself the burden of proving that he had paid the hire of the vessel, for the time and at the rate stated in the declaration; and the plaintiffs are not bound to prove any of the facts therein charged.

The certificate of the commissioners who have taken a deposition, that they had taken the oath prescribed in their commission, is sufficient evidence of that fact. They are *quasi* officers of the court, and are to be believed.

COVENANT upon an agreement under seal, which was in substance as follows:—

That Winter and Bowmans of Bath, (in Maine,) owners of the brig James Munroe of Bath, "agree to let or hire the said brig to the said Simonton, from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade, for the space of twelve months, at and after the rate of \$425 per month, and the said Winter and Bowmans agree that the said brig shall be tight, stiff, staunch, and strong, well victualled and manned at their own expense, during that period, the dangers of the sea only excepted; and the said Simonton on his part agrees to pay or cause to be paid, to the order of the said Winter and Bowmans, on the arrival of the said brig at Havana, the sum of \$600; and the said Simonton agrees to pay, or cause to be paid all port-charges and pilotages at every place where she may go to; and the said Simonton further binds himself and agrees to pay, or cause to be paid, after the first-mentioned payment, \$600 from time to time, as the charter of the said brig amounts to that sum; that is to say, when the said brig earns \$600 at the rate of the before-mentioned charter, it is to be paid in Spanish milled dollars in the United States, or in good and approved bills of exchange at from ten to sixty days sight on Boston, New York, or Philadelphia, to the order of Winter and Bowmans. And it is further understood clearly that the said Winter and

Bowmans are to be at no other expense than that of victualling, manning, and keeping the hull and rigging of the said vessel in good order. And the said Simonton agrees that this charter shall commence nine days before the brig's leaving the wharf for sea, which shall be noted at the foot of each agreement, being signed in triplicate; and it is understood, the said Simonton has liberty of lading said vessel with any articles he may think proper, contraband goods always excepted;" penalty \$2000; and dated July 15, 1820.

At the foot of the agreement is the following, signed by all the parties:—"In case war between the United States and Spain takes place in the intermediate time of the within specified charter of the within named brig James Munroe, it is understood between the parties that the charter shall be null and void on the first information of that event; but that the said Simonton shall deliver the said brig to the within named Samuel Winter and S. G. and J. Bowman, at Bath aforesaid, he paying charter at the rate within specified, up until the time she is so delivered, the dangers of the seas and enemies excepted. And the parties within named further agree, that the charter shall commence on the 7th day of July, 1820."

The declaration, after setting out the substance of the contract, and averring performance of the covenants, on the part of the plaintiffs to be performed, averred that the brig, on the 7th of July, 1820, being in fit and proper condition, was, by the said Simonton, taken into his service, and on the 16th sailed from Bath, and afterwards arrived at Havana; during all which time, and afterwards, the said brig, under the direction and control and in the employment of the said Simonton, until the 20th of January following, when, during the prosecution of a voyage under the direction of the said Simonton, the brig was lost by the perils of the sea; at which time she had earned \$2,734.17, for the hire and affreightment of the said brig, in virtue of the said charter-party, viz., at the rate of \$425 per month, during the said term of twelve months, for which the said brig had been let and hired by the said charter-party, as aforesaid, and from and after the said 7th day of July, 1820, until the loss of the brig as aforesaid, &c.; which said sum of \$2,734.17 was then and there in arrear and unpaid, and due and owing by the defendant to the plaintiffs, of which he had due notice, but has never paid the same, &c.

After the opinion of the Court upon the demurrer heretofore taken to the declaration, the plaintiffs had leave to amend it, which they did, and the defendant then pleaded four pleas in bar, viz:—

First plea. "That he, the said defendant, hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and meaning of the said articles of agreement, and of this he puts himself upon his country. And the plaintiffs likewise."

Second plea. "That the plaintiffs did not, on their part, perform and keep the covenants and stipulations in the said articles of agreement contained, on their part and behalf to be performed and done, according to the tenor and effect, true intent and meaning of the same, in this, to wit: that the said brig or vessel in the said articles of agreement mentioned, the James Munroe, did not pursue the voyage and voyages which the said defendant ordered and appointed for her, and carry on the legal trade in which the said defendant engaged and employed her; but did, without any sufficient lawful cause therefor, depart and deviate from the same; and did, on the 27th of November, 1820, while subject to the order and control of the said defendant, under and by virtue of the said articles of agreement, omit and fail to proceed from Port au Prince to Crooked Island, as the defendant had ordered and appointed; and did unlawfully, and in violation of said articles of agreement, and of the duty and obligations imposed by the same, proceed to the port of Havana, in the island of Cuba, against the orders and directions of this defendant, whereby he sustained great loss and expense, and the voyage in which the said vessel or brig was engaged was greatly delayed and defeated; and afterwards, while the said articles of agreement continued in full force and effect, viz., on the 30th of December, 1820, the said brig or vessel did unlawfully sail from said Crooked Island to Ragged Island, instead of proceeding to the port of Mobile, to which she was destined and bound, according to the orders and instructions of this defendant, whereby and by reason of such unlawful deviation from her voyage, and violation of the orders of this defendant, the said voyage was wholly defeated; and the said brig or vessel was afterwards, viz., on the 20th of January, 1821, wholly lost by shipwreck, and a cargo on board belonging to this defendant, of the value of \$10,000, was wholly lost and destroyed to this defendant; and this he is ready to verify," &c.

Third plea. This plea was, in substance, that while the brig was lawfully subject to the orders and directions of this defendant, she was dispatched and ordered by the defendant, in a lawful trade, from Port au Prince to Crooked Island, and sailed in the said voyage; "Yet the captain and crew of the vessel, in

violation of the orders of the defendant, did carry the said brig to the port of Havana ;" whereby, &c.

Fourth plea. The fourth plea, in substance, was : That on the 30th of December, 1820, the brig being at Crooked Island, to take in a cargo of salt for the defendant, to be carried direct to Mobile, the defendant procured insurance to be made from Crooked Island to Mobile ; yet the captain and crew, well knowing the premises, and without the consent of the defendant, deviated from the said voyage without lawful authority or excuse, and proceeded from Crooked Island to Ragged Island ; in consequence of which deviation the brig was lost, and the insurance became void.

To the three last pleas there were general demurrers and joinders.

Mr. Barrell, for the plaintiffs, to show that the matters pleaded in these pleas were not conditions, or covenants precedent, cited 5 Petersdorff's Ab. 313, 314, 318, 325, 326, 328, 329 ; *Havilock v. Geddes*, 10 East, 555 ; *Ritchie v. Atkinson*, 10 East, 295 ; *Shields v. Davis*, 6 Taunt. 65 ; *Davidson v. Gwynne*, 12 East, 381 ; *Sheels v. Davies*, 4 Camp. 119 ; *Cole v. Sharrod*, 3 Evans, 41 ; S. C. 5 Petersdorff, 390 ; *Bornmann v. Tooke*, 1 Camp. 377.

Mr. Bradley and *Mr. Coxe*, *contra*, contended that obedience of orders was, in the nature of things, precedent to the right to recover for the use of the vessel ; that freight is not earned until the end of the voyage, and the delivery of the goods ; that the contract of freight is entire ; that, in the present case, nothing was due until the end of the twelve months for which the vessel was hired ; that the question, whether a covenant be precedent or not, depends more on the nature of the covenant than on its words. They cited *Havilock v. Geddes*, 10 East, 555 ; *Ritchie v. Atkinson*, 10 East, 295 ; *Shields v. Davis*, 6 Taunt. 65 ; *Davidson v. Gwynne*, 12 East, 381 ; *Sheels v. Davies*, 4 Camp. 119 ; 5 Petersdorff, 314, n., 329, 347, 368 ; *Hotham v. E. I. Comp.* Doug. 272 ; *Constable v. Clobberie*, Palmer, 397 ; *Bornmann v. Tooke*, 1 Camp. 377 ; *Osgood v. Groning*, 2 Camp. 466 ; *Luke v. Lyde*, 2 Burr. 882 ; *Cooke v. Jennings*, 7 T. R. 381 ; *Olhser v. Drummond*, 2 Chit. 705 ; Com. on Cont. 323 ; *Kenoyer v. Bluff*, 15 Johns. 332 ; *Liddard v. Lopez*, 10 East, 526 ; *Caze and Richaud v. Balt. In. Co.* 7 Cranch, 362 ; Selw. N. P. Covenant, 444 ; 4 Bac. Ab. 627, Merchant, H. ; *Byrne v. Pattison*, 2 B. & A. 17 ; S. C. Abbott, 270, n. ; 2 Bac. Ab. Covenant, D ; 2 Selw. N. P. 439 ; *Jacobsen's Sea Laws*, 229 ; Abbott, 134, 163, § 13, 209 ; *Ritchie v. Atkinson*, 10 East, 306 ; *Magalhaens v. Busher*, 4 Camp. 54, 55, 389 ; Abbott, 133, 179, 265, § 19 ; 3 Chitty's

Pleadings, 96, 317, 319, 490, 492; 5 Petersdorff, 341, § 2, 345, 346; *Clarke v. Gurnell*, 1 Bulstrode, 167; *Mackrell v. Simond & Hankey*, Abbott, 209, 267; *Bright v. Cowper*, 1 Brownlow, 21; *Smith v. Wilson*, 8 East, 445. See also *Cole v. Shallet*, 3 Lev. 41; *Shower v. Anderson*, T. Jones, 216; *Potter v. Shephard*, 6 T. R. 665; *Campbell v. Jones*, 6 T. R. 571; *Thorpe v. Thorpe*, 1 Salk. 171; *Gibbon v. Mendez*, 2 B. & A. 17; *Vallejo v. Wheeler*, Cowp. 144, 147, 154, 155; *Hutton v. Bragg*, 2 Marsh. 339; S. C. 7 Taunt. 14; *Trinity House v. Clark*, 4 M. & S. 288; *Saville v. Campion*, 2 B. & A. 503; S. C. 5 Petersdorff, 299; *Paul v. Birch*, 2 Atk. 621; *Frazer v. Marsh*, 13 East, 238; S. C. 2 Camp. 517; *McIntire v. Bowne*, 1 Johns. 229; *Hooe & Co. v. Groverman*, 1 Cranch, 215; *Fletcher v. Braddick*, 2 New Rep. 182; Story's Abbott, 33, (27); *Cheriot v. Barker*, 2 Johns. 346; *Tate v. Meek*, 2 Moore, 278, cited in 2 B. & A. 509, not then reported; *Yates v. Railston*, 2 Moore, 294, also cited in 2 B. & A. 509; *Yates v. Mennell*, 2 Moore, 297.

CRANCH, C. J., delivered the opinion of the Court upon the demurrers.

The second plea sets up, by way of defence, supposed breaches of covenant on the part of the plaintiffs, and the questions occur, 1st. Whether any of the facts stated constitute such a breach of covenant on their part; and 2d. If so, then whether the covenants, so broken by the plaintiffs, were precedent covenants on their part. Both of which questions must be answered in the affirmative, or the plea must be adjudged bad.

Do any of the facts averred in the plea constitute a breach of covenant on the part of the plaintiffs?

The facts stated in that plea are, that the brig did not pursue the voyage and voyages which the defendant ordered and appointed for her, and carry on the legal trade in which the defendant engaged and employed her, but did, without any sufficient or lawful cause therefor, depart and deviate from the same; and did, on the 27th of November, 1820, while subject to the control of the defendant, omit and fail to proceed from Port au Prince to Crooked Island, as the plaintiff had ordered and appointed, and proceeded to Havana, against the orders and directions of the defendant; and on the 30th of December sailed from Crooked Island to Ragged Island, instead of proceeding to Mobile, according to the orders of the defendant; by which deviation, and violation of orders the voyage was defeated, and the vessel and cargo lost, on the 20th of January, 1821.

This plea is founded upon the supposed obligation of the

plaintiffs, either by express covenant, or by implied duty as owners, to see that the brig should perform such voyages as the defendant should indicate; and that the discharge of such obligation or duty was a condition precedent to the right of the plaintiffs to recover the sum stipulated to be paid for the hire of the brig. No such express covenant is found in the charter-party.

The only express covenants, on the part of the plaintiffs, are : 1. To let or hire the brig to the defendant, to be used by him, from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade, for the term of twelve months; 2. That she shall be tight, stiff, stanch, and strong, well-victualled and manned, at the plaintiff's expense, during that period; the dangers of the seas excepted.

If there be any covenant that the brig should go to Havana, or any other port, it is a covenant on the part of the defendant, and for the security of the plaintiffs; for if the brig had never arrived at Havana, the plaintiffs, according to the case of *Gibbon v. Mendez*, 2 B. & A. 17, could never have recovered any thing for the hire; because no payment was to be made by the defendant until the arrival of the brig at that port.

Nor was there an implied obligation upon the plaintiffs, as owners, to see that the brig should perform such voyages as the defendant should indicate. The possession of the whole vessel and crew was delivered to the defendant, to use them in such voyages, and in such lawful trade as he should think proper, with the single limitation of going first to Havana. In that respect, the vessel, the master, and mariners were, as is admitted by the plea, subject to the order and control of the defendant.

He had a right to direct the lading and destination of the brig, and he was to pay all port charges and pilotages at every place to which she might go. No orders, in these respects, were to be given to the master or mariners, by the plaintiffs. That it was the intention of the parties that the possession of the brig should belong to the defendant is evident from his covenant in the memorandum at the foot of the charter-party, that in case of a war with Spain, he should deliver the brig to the plaintiffs at Bath, "he paying charter at the rate within specified until the time she is so delivered, the dangers of the seas and enemies excepted."

In regard, therefore, to the destination and loading of the vessel, the defendant himself was owner *pro hac vice*; and the plaintiffs were under no implied obligation to see that the specific voyages should be performed, which the defendant might project.

This was not a contract of freight, but of hire. The plaintiffs did not covenant to carry goods, or to perform any specific voyage. In Story's *Abbott*, p. 273, it is said, that if the price of transportation of goods be paid upon their being laden on board the vessel, even "this payment, although commonly called freight, is not properly so denominated, that word denoting the price rather of actual carriage than of receiving goods in order to be carried; and therefore in the case of *Blakey v. Dixon*, 2 B. & P. 321, the Court, admitting that an action might be brought for money agreed to be paid on receiving the goods on shipboard in order to be transported, decided that such money could not be recovered by the name of freight." Freight is a compensation for the carriage of goods. *Watson v. Duykink*, 3 Johns. 335.

In the present charter-party the word freight is cautiously avoided, even at the expense of some awkwardness of expression. The plaintiffs agree to "let, or hire," not "let to freight," as is usual in charter-parties of affreightment. The instrument is called "this memorandum of an agreement;" not "this charter-party of affreightment," as is usual in contracts for freight. The word voyage is not used in any part of the instrument, probably because that word, in common acceptance, includes the idea of a mercantile adventure, and not merely the act of going from one port to another; and because the price to be paid was for the time and ability to use the vessel, and not for the actual use of her. The word "freight" was probably avoided because it implied an actual transportation of goods, and it might possibly be said that no freight would be due if no goods should be transported. The usual words "for a voyage," were probably avoided because it might be said that no freight would be earned until the voyage should be ended.

The parties have substituted the word "charter" for the usual term "freight." Thus the defendant agrees "to pay \$600 from time to time as the charter of the said brig amounts to that sum; that is to say, when the said brig earns \$600, at the rate of the before-mentioned charter, it is to be paid in Spanish milled dollars," &c. And again, the defendant agrees "that the charter shall commence nine days before the brig's leaving the wharf for sea;" and in the memorandum it is provided that, in a certain event, the defendant is to deliver the brig to the plaintiffs at Bath, "he" (the defendant) "paying charter at the rate within specified."

The defendant was at liberty to take in goods on freight. In that case the defendant would be entitled to the freight and the plaintiffs to the hire, or the charter, as it is called in the agreement; and each might insure his own interest. The plaintiffs

might insure the hire, the defendant the freight. If the defendant had taken in goods on freight, the shipper's remedy for non-delivery of those goods would have been against the defendant as owner *pro hac vice*, and not against the plaintiffs.

The Court is therefore clearly and unanimously of opinion that this is a case of hire and not of freight. The price was earned by time, not by the carrying of goods, or the ending of a voyage, except as to the payment of the first sum of \$600 at Havana. The arrival of the vessel at Havana was a condition precedent to the payment of that sum, not because it was the freight of goods, nor because the voyage was there ended; but because, until the arrival of the brig at Havana the *casus fæderis* would not have occurred.

The Court being of opinion that there was no obligation upon the plaintiffs, either express or implied, to see that the vessel performed the voyage, projected by the defendant, it is unnecessary to consider the other question, viz. whether the plaintiff's discharge of such an obligation, if it had existed, would have been a condition precedent to the payment of the sum stipulated to be paid for the hire of the vessel; and all the cases may be laid aside which were cited to show that freight is not due until the goods are delivered, or the voyage ended; and to show what covenants are precedent, and what are mutual.

The Court has carefully examined the authorities cited, and many more, to show in what cases the owner, and in what the charterer, shall be considered as the owner *pro hac vice*; and they find no case in which the charterer has been held to be owner *pro hac vice*, so strong as the present; and none in which the possession of the vessel, for the time, has been more completely transferred to the charterer.

It would occupy too much time to remark particularly upon the authorities which have been consulted upon that point.

The Court has also examined the declaration, and can see no substantial fault in it; and we are unanimously of opinion that the 2d plea is bad.

The 3d plea avers a deviation by the master and crew, while the vessel was lawfully subject to the orders and directions of the defendants; and

The 4th plea avers that the captain and crew deviated, whereby the vessel and insurance were lost.

The Court is of opinion that both these pleas are bad for the reasons before given in regard to the 2d plea.

After the opinion of the Court was given, the cause came on for trial upon the issue joined upon the first plea, which was, in substance, that the defendant "hath paid to the said plaintiff's

all and every such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning of the said articles of agreement; and of this he puts himself on the country," and the plaintiffs likewise.

Upon the trial of this issue, *Mr. Barrell*, for the plaintiffs, offered the deposition of *Mr. Weber*, the master of the brig, taken under a commission from this Court.

Mr. Bradley, for the defendant, objected that it did not appear that *William Terry*, who certifies himself to be a justice of the peace, and that the commissioners took before him the oath required by the commission, was a justice of the peace.

The COURT, however, overruled the objection, saying that the certificate of the commissioners was sufficient evidence that the oath had been properly taken. They are *quoad hoc* the officers of this Court, and are to be believed.

In the course of the trial, which occupied several days, the COURT (CRANCH, C. J., absent,) instructed the jury, at the request of the plaintiff's counsel, "that the plea is no traverse of any averment in the declaration necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity, in supporting the issue on their part above joined, to prove any averment in their declaration; but that the whole *onus probandi*, under the affirmative plea of payment, is on the defendant to prove such payment as he has alleged;" the Court being of opinion, and so expressing it to the jury, that upon the issue joined in this case, and which the jury had been sworn to try, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel for the time stated in the declaration, at the rate of \$425 per month."

The defendant took a bill of exceptions and carried the cause to the Supreme Court, where it was reversed (5 Peters, 141,) for error in that instruction; but *Mr. Justice Thompson*, who delivered the opinion, intimated that the judgment of this Court upon the demurrer, was probably correct.

NEGRO LIZETTE LEE & others v. AUGUSTUS PREUSS.

Upon a petition for freedom by slaves entitled to emancipation at a future day, the Court refused to instruct the jury, that they might find their verdict for the petitioners, although that day had not yet arrived; and upon a special verdict showing their

right to emancipation at a future day, not yet come, the Court rendered judgment for the defendant; and refused, as a court of equity, to continue an injunction which had been served upon the marshal to prevent him from delivering the petitioners to the defendant at law, during the pendency of their suit for freedom; being of opinion that the only ground of the right of the Court to interfere was the petitioner's claim to immediate freedom; and the pendency of their suit at law. That the fears alone of the petitioners, that the defendant, who was a citizen of Maryland, would violate the laws of that State, were not a sufficient ground of jurisdiction to require of him security that he would not do so.

PETITION for freedom by Lizette, John, and Janette, or Jeane, children of Joanna, and Nancy, the daughter of Lizette.

The petitioners having given evidence tending to prove their right to emancipation after certain periods of service respectively which had not yet expired, prayed the Court by their counsel, *Mr. Barrell*, to instruct the jury, in effect, that they might find the issue for the petitioners, although their respective terms of servitude, according to their deed of emancipation, had not expired; which instruction, the COURT (*THRUSTON, J. contra*) refused to give.

The jury found a special verdict, which stated,

1. "That the negro girl Joan or Joanna, on the 24th of June, 1797, was the property of Anthony Addison, then a citizen of Maryland, residing in Prince George's county, in that State, where he held her as a slave for life.

2. That on that day he sold her to Walter Addison, also a citizen of Maryland and residing in the said county, for a term of twelve years, by a bill of sale in writing, *in hæc verba*, &c.

3. That after the said Walter Addison had held her about eighteen months under the said bill of sale he exchanged her unexpired term with one Peter Savary, then a citizen of Maryland, and residing in the same county, for a like term in another negro woman, the latter to be returned to Savary at the expiration of the said term. And we find that at the time of this exchange there was a stipulation and an understanding between the parties principals, that the children of the said Joanna, born or to be born, were to be free after having served, men children until they attained the age of thirty or thirty-one years, and female children when they should attain the age of twenty-five years respectively; and that the said Joanna was then delivered, and held in the said State and county, until the expiration of the said term; and that afterwards she was returned and given up to the said Anthony Addison.

4. That three of the petitioners, to wit, John, Lizette, and Janette or Jeane, are children of the said Joanna, born during the said term of twelve years; and the petitioner Nancy is the child of the petitioner Lizette, and was born long after the ex-

piration of the said term, to wit, in the year 1825, or thereabout; the mother still being held by the said Savary.

5. That the said Savary did not deliver up the said petitioners to the said Anthony Addison; and that upon the death of the said Savary, they came to the possession of the defendant as administrator of Savary.

6. That after the expiration of the said term, to wit, on the 8th of October, 1809, the said Anthony Addison executed in the said State of Maryland, and acknowledged an instrument of writing, purporting to be an emancipation of the said Joan or Joanna, and her children; among others, of the three first above-named petitioners, after certain terms of service expressed, or reserved in the said writing, which, with the acknowledgment and memorial of the record thereof, we find, in these words, &c.

7. We find that the terms of service, which the said instrument purports to have reserved and annexed to the emancipation of the said petitioners respectively, will expire at the times following, to wit, of the said John in May, 1830; of Lizette at Christmas, 1827; of the said Janette or Jeane, on the 19th of May, 1834; and the petitioner Nancy is about two years old.

“If upon the facts so found,” &c.

The COURT, upon the facts so found, was of opinion, (*nem. con.*) that the petitioners will be entitled to their freedom, at the expiration of their respective terms of servitude agreeably to the deed of emancipation from Anthony Addison.

“But a majority of the judges are of opinion that as none of those terms of servitude have yet expired, the judgment upon the special verdict must be for the defendant; who being now fully apprised of the petitioners’ contingent right to freedom, will take care that he do not subject himself to the penalty of the law of Maryland by selling them out of the State for a longer time than they have to serve by law.”

THRUSTON, J., doubted upon the last point; and was understood to be of opinion that the issue, submitted to the jury, was whether the petitioners were the slaves of the defendant; and that as they had a right to emancipation at a future day they could not now be slaves.

Mr. Barrell, then, as solicitor for the petitioners, filed a bill for injunction in each case, stating their contingent right to freedom, and their fears that the defendant would sell them to persons who would carry them to some distant place, where they would not be able to prove and maintain their right to freedom.

The petitioners had run away from the defendant, believing themselves entitled to freedom, and had been taken up and committed to jail here where they petitioned for their freedom. The

Court had ordered the marshal not to deliver them up to the defendant unless upon his entering into the usual recognizance, or until the further order of the Court. The bills, now filed, prayed that the injunction on the marshal should be continued until the defendant should give security not to sell the petitioners out of the State of Maryland, nor for a longer term than they have to serve.

The COURT, however, (THRUSTON, J., *contrà*.) refused to continue the injunction after judgment at law in favor of the defendant, being of opinion that the only ground of their right to interfere was the petitioners' claim to immediate freedom, and the pendency of their suit in this Court; that their suit being now ended and judgment against them, although they may be hereafter entitled to freedom, the COURT think they cannot require security from the master that he will not violate the laws of Maryland; the fears alone of these petitioners, would not give this Court jurisdiction. No final relief could be given. Nothing is asked for by the bill, and nothing could be given, but security that the master, in exercising his acknowledged rights, would not violate the law of Maryland, the place of his residence. It is possible that the Courts of Maryland might be of a different opinion as to the rights of the petitioners, and we might bind the defendant not to do, what they might determine he might lawfully do.

Injunction refused.

WOOD v. FRANKLIN.

In an action of debt upon a replevin bond, setting forth the condition and averring special breaches, the plea of general performance is a bad plea; so is the plea of *non damnificatus*; so is the plea that the plaintiff had no property in the goods replevied; so is the plea of *nul tiel record* if no record is averred in the declaration; and so is a plea to the whole declaration, which is an answer to a part only.

DEBT on a replevin bond given in the suit of *Arguelles v. Wood*. The declaration set forth the condition of the bond, and averred, 1. That Mrs. Arguelles did not prosecute her writ with effect. 2. That she did not establish a lawful right to the goods replevied. 3. Nor return the goods, although a return was awarded by the court; and 4. That she did not pay the damages and costs adjudged by the court.

The defendant, at the last term, had leave to amend his pleading, and now offered to plead, 1. General performance. 2. As to so much of the declaration as averred that the plaintiff had recovered a judgment against Mrs. Arguelles, no such record.

Withers v. Thornton.

3. *Non damnificatus*. 4. That the goods were the property of Mrs. Arguelles; without this, that the plaintiff had any property in the same.

Mr. R. S. Coxe, objected to the receiving of these pleas, under the leave to amend, because they would be all bad upon demurrer.

The pleas of "general performance" and *non damnificatus*, are bad after assignment of special breaches.

The plea of "no such record" is bad, because no record was averred in the declaration.

The plea that the plaintiff had no property in the goods replevied is bad, because no such property was averred in the declaration; and the plea is wholly impertinent and immaterial.

The defendant also pleaded that the Court did not order a return; but this plea being pleaded to the whole declaration, when it is only an answer to one of the breaches assigned, is also bad.

And of this opinion was the COURT, who rejected the pleas, (*nem. con.*)

The authorities cited were, *Cutler v. Southern*, 1 Williams's Saunders, 116; 2 Chitty's Plead. 528, note a; *Postmaster-General v. Hawkins*, 2 Johns. 413; *Blackenbury v. Pell*, 12 East, 588.

WITHERS v. THORNTON.

In ordinary cases of libel, special bail is not required without some special reason other than the publication of the libel itself.

ACTION on the case for a libel which charged that the plaintiff's patent for an improvement in winged gudgeons, was a gross imposition, and the plaintiff an impostor.

The affidavit to hold to bail, did not aver the charge to have been made either falsely or maliciously; nor that any damage has resulted to the plaintiff exclusively, from the libel charged in the declaration; but that the damage, of which he complains, resulted from that and other publications, and verbal denunciations, "together with certain other letters, handbills, and publications of the said Thornton," so that it does not positively appear to the Court by the affidavit, whether any, or, if any, how much of the damage arose from the libel charged in the declaration.

The COURT (*nem. con.*) refused to require the defendant to give special bail. In ordinary cases of libel, special bail is not required without some special reason other than the publication

Ex parte Bill.

of the libel itself, such as non residence of the defendant, or the like. See *Norton v. Barnum*, 20 Johns. 337; *Clason v. Gould*, 2 N. Y. T. R. (Caines,) 47; *Van Vetchen v. Hopkins*, 2 Johns. 293; Barnes's Notes, 79, 80, 108; *Chetwin v. Venner*, 1 Sid. 183; *Marquis of Dorchester's case*, 2 Mod. 215.

Ex parte A. T. F. BILL.

A recommitment of a debtor upon a *ca. sa.* after he has been out for more than a year upon a prison-bonds bond, is not a breach of his privilege as a witness and party, bound to attend the Court.

HABEAS CORPUS. Upon the return it appeared that Mr. Bill had been committed in execution upon a *ca. sa.*, and had taken the benefit of the prison bounds, upon giving the bond and security required by law, more than a year ago. At the expiration of the year the plaintiff required the marshal to recommit him to close custody, agreeably to the Act of Congress of June 24, 1812, § 3, [2 Stat. at Large, 755,] "to amend the laws within the District of Columbia," by which it is enacted, "that the benefit of the prison rules shall not be allowed to any debtor hereafter taken or charged in execution within the said district for more than one year from the date of the bond given by him or her for keeping within the said rules, after the expiration of which time, if the person so taken or charged in execution shall not be discharged by due course of law, it shall be the duty of the marshal or other officer, to whose custody such person was committed, to recommit him, or her, to close jail and confinement, there to remain until the debt for which, he or she was taken or charged in execution shall be paid, or until he or she shall be discharged under the Act of Congress for the relief of insolvent debtors within the District of Columbia."

The marshal, accordingly, so recommitted him during the session of this Court, and while Mr. Bill was bound to attend this Court as a witness, and had a cause depending in court for trial at this term.

Mr. Bill moved to be discharged, and claimed the right of a witness, and of a party to be free from arrest during the session of the Court.

The COURT (*nem. con.*) refused to discharge him, being of opinion that it was not a new arrest; but was analogous to the case of the bail taking his principal, which is said to be an exception to the general rule. See 3 Starkie on Ev. Part 4, pages 1726, 1727.

The prisoner was remanded.

FOYLES, for the use of Smallwood, v. THOMAS LAW, Special Bail
of J. D. Barry.

The court will not order an execution against bail to be stayed because a writ of error has been taken out by the principal, which is still pending in the Supreme Court, it not having been taken out in time to be a *supersedeas*; nor will they grant an injunction for the like cause.

If the party is taken upon a *ca. sa.* an injunction will not relieve him.

If a defendant is brought in upon a *ca. sa.* and not committed in execution, and the execution "not called by consent," it seems that the plaintiff cannot have another execution.

A WRIT of error had been sued out by Barry to the original judgment against him, but too late to be a *supersedeas*; and a *ca. sa.* against him having been returned *non est*, a *scire facias* against Mr. Law as his bail was sued out, and a *ca. sa.* awarded thereon against him upon which he was arrested, and brought into court by the marshal.

The COURT, upon motion, refused to order the execution against Mr. Law to be stayed until the writ of error to the original judgment should be decided in the Supreme Court of the United States.

Mr. Law then filed a bill for an injunction.

Mr. Worthington for Mr. Law, contended that it was not too late, and that an injunction to stay further proceedings at law would justify the marshal in discharging Mr. Law from the arrest upon this execution; and he cited the case of *West's Executor v. Hyland*, 3 Har. & John. 200, to show that after a return of *cepi* upon a *ca. sa.*, if no other entry be made on the record, and the plaintiff take no further steps, either by praying the defendant in commitment, or defaulting the sheriff, or by stating, on the record, that the plaintiff, by consent of the defendant, "elected not to call the execution," the plaintiff may have a new *ca. sa.*¹

CRANCH, C. J. But in the present case the plaintiff does not elect not to call the execution, but has called upon the marshal to return the writ; and it is now returned "*cepi*," and the plaintiff prays that the defendant may be committed in execution.

The equity relied on in the bill is, that there is error in the original judgment; that the plaintiff expected that the case in error would have been decided before the plaintiff at law could obtain an execution against the complainant; that if the money

¹ It appears in the record of the case of *West's Executor v. Hyland*, that the defendant had escaped from the first *ca. sa.* and therefore the Court refused to quash the second *ca. sa.* See 7 Peters, 677.

should now be paid to the plaintiff at law, there will be great trouble, delay, and expense in getting it back, and risk of losing it altogether.

All the equity of the case may be resolved into the negligence of the principal debtor, in not obtaining a *supersedeas* in proper time; and of the bail, in not producing his principal upon the return of the *scire facias*. I do not think there is equity enough to justify the Court in depriving the plaintiff at law of his legal remedy; no fault can be imputed to him. Nor do I think that an injunction to stay further proceedings at law in the case, can avail the complainant; for there is nothing remaining to be done to enforce the judgment. The plaintiff has gone the whole length, and the marshal has nothing further to do. If the Court should refuse to order the defendant, Mr. Law, to be committed in execution, I doubt very much whether the plaintiff could have a new execution. A *ca. sa.* is the highest execution the party can have. When the body is taken on a *ca. sa.*, and the writ is returned and filed, it is an absolute and perfect execution of the highest nature against the defendant, and no other execution can afterwards be had against his lands or goods, except where a person dies in execution; in that case, his lands and goods are liable to satisfy the judgment, by the statute of 21 Jac. 1, c. 4; 3 Bl. Com. 415.

The case of *West's Executor v. Hyland*, cited by Mr. Worthington, is reported without argument, or reasons given for the judgment of the court. It is probable, however, that it was considered as a case within the statute of 1789, c. 42, by which, if a plaintiff elect not to call a *ca. sa.* at the return term, with the assent of the defendant, he may have a new *ca. sa.*; and the election of the plaintiff, and the assent of the defendant, not to call that *ca. sa.*, must have been proved to, or presumed by, the court, from the silence of both parties.¹

This is not a case coming within that statute; and if the Court should refuse to commit the defendant in execution, at the prayer of the plaintiff, I do not think, as I before observed, that he could have a new execution.

I also think that the injunction must be refused, because it has nothing to operate upon. There is no proceeding at law to be stayed. The judgment is executed; and because, if it should operate as a discharge of the defendant from this execution, the plaintiff cannot have another.

Injunction refused.

¹ See the case of *West v. Hyland*, cited in 7 Peters, 677, in Appendix.

JAMES D. BARRY v. ROBERT BARRY.

When the accounts of the parties, in an action at law, are referred by the Court to an auditor, the party excepting to the report will have the same benefit, at the trial of the issue, (to the extent of his exceptions,) as he would have had if he had formally pleaded or demurred before the auditor, according to the English forms of proceeding in actions of account. What is not excepted to, will be considered as admitted. The auditor's report is of no avail, but to ascertain the points really litigated by the parties.

The Court will permit only so much of the report to be read to the jury as states the items claimed by either party, and objected to by the other, so as to show what is litigated by the parties.

Items of partnership account cannot be recovered in a suit at law by one partner against the other, if the joint concerns have not been settled. The accounts current rendered by each to the other are admissible in evidence, to show, by the admissions of the parties, that the items are not items of partnership account.

In an action upon an open account, the plaintiff may give evidence of any item of which the defendant has had reasonable notice; and the exhibiting and filing a claim for a particular item before the auditor, will be considered as reasonable notice of such claim.

The proceedings in equity, in a cause in which the present plaintiff and defendant are parties, may be read in evidence, to show that the defendant had charged to another account some of the articles charged against the plaintiff in the present action.

If an account current be received and kept without objection, except as to particular items, the person so receiving it may still surcharge, and falsify as to other items.

THIS was an action at law, claiming \$27,527.04, as a balance of account due by the defendant to the plaintiff. It was commenced by attachment, under the Maryland Act of 1795, c. 56; but the defendant appeared and gave special bail, and dissolved the attachment. The accounts between the parties appearing to the Court to be very complicated, the Court referred the accounts to an auditor, under the 12th section of the Maryland Act of 1785, c. 80, which authorizes the Court "to order the accounts and dealings between the parties to be audited and stated by an auditor or auditors, to be appointed by such court, and there shall be such proceedings thereon as in cases of actions of accounts."

The auditor stated an account, showing a balance of \$17,517.68, due by the defendant to the plaintiff.

The defendant excepted to certain items of the statement.

The COURT (MORSELL, J. absent,) said that the defendant would have the same benefit at the trial of the issue, (to the extent of his exceptions,) as he would if he had formally pleaded or demurred before the auditor, according to the English form of proceedings in actions of account. That the auditor's report is of no avail, but to ascertain the points really litigated by the parties; and that what is not excepted to will be considered as admitted.

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At the trial before the jury, at December term, 1826, *Mr. Jones*, for the plaintiff, offered to read the report of the auditor.

Mr. R. S. Coxe objected. The report is an award, which the auditor in "account" has no power to make. He was only to state the accounts, and ascertain what items were disputed. The practice of Maryland, under the statute, is like that in "actions of account." *Mantz v. Collins*, 4 Har. & McHenry, 65; *Godfrey v. Saunders*, 3 Wilson, 113; *Finney v. Harbeson*, 4 Yates, 514.

Mr. Worthington, on the same side, cited Com. Dig. Accompt, E. 15; *Crousilat v. McCall*, 5 Binney, 435, 438; *Desobry v. Delaistre*, 2 Har. & Johns. 221; *Consequa v. Fanning*, 3 Johns. Ch. Rep. 587.

The COURT (*nem. con.*) permitted only so much of the report to be read to the jury as states the items claimed by either party and objected to by the other, so as to show what was litigated by the parties; and refused to permit him to read arguments or statements of evidence, made by the auditor in his report.

The defendant having offered evidence that the plaintiff and defendant had been in partnership in a tan-yard, and it appearing that some of the items in the plaintiff's account were for leather, which the defendant suggested might be their joint property,

The COURT (*nem. con.*) said that the accounts might go in evidence to the jury, and that it was competent for the defendant to prove that any items in the accounts were really for the joint concern, and, if the jury should so find them, and that the partnership concerns were not settled, they could not, in this cause, find for the plaintiff as to those items. One of the jurors being taken very ill, a juror was withdrawn by consent, and the cause was continued to the next term, May, 1827.

Upon the trial, at this term, it appeared that the plaintiff's account, filed as the foundation of the attachment in this cause, commenced with a balance of \$4,234.08; whereupon *Mr. Worthington*, for the defendant, objected to the plaintiff's giving evidence of any item of account not constituting part of an account the balance of which should not appear to be \$4,234.08.

But the COURT (*nem. con.*) refused to restrict the plaintiff to such proof, and said that the plaintiff might give evidence of any item of which the defendant had had reasonable notice; and that the exhibiting and filing of claims before the auditor would be considered as reasonable notice that he meant to rely upon such claims.

The plaintiff had produced in evidence the accounts current

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of the defendant against him, and relied upon surcharging and falsifying; and, in order to show that a certain charge of \$9,000 ought to have been made against the estate of one James Barry, of which the plaintiff was executor, and not against the plaintiff personally, he offered to read the proceedings in a suit in equity, by Rabourg, Hearne, and the present defendant, Robert Barry, against the present plaintiff, James D. Barry, as executor, and others, as heirs of the said deceased James Barry, in which the same sum of \$9,000 was charged to the estate of the said James Barry, which

The COURT (THRUSTON, J., absent,) permitted him to do.

Mr. Coxe, for the defendant, prayed the Court to instruct the jury, that if they should find, from the evidence, that the defendant transmitted to the plaintiff the accounts current which have been given in evidence by the plaintiff in this cause, at or about the time when they respectively bear date, and that the plaintiff retained these accounts without objection, or with objection only to particular items, it is not competent for the plaintiff, by any evidence at this time, to surcharge and falsify the said accounts, beyond such items specially objected to. *Murray v. Toland*, 3 Johns. Ch. Cas. 569.

But the COURT (MORSELL, J., doubting,) refused to give the instruction.

Mr. Coxe then prayed the Court to instruct the jury, that it is incumbent on the plaintiff, in his attempt to surcharge and falsify the accounts current transmitted by the defendant to the plaintiff, to do so by the fullest and most distinct proof, and the inaccuracy of each item so sought to be falsified; and that the jury cannot by law, without such full and distinct proof, now reject any such item.

But the COURT refused also to give this instruction.

Mr. Coxe then prayed the Court to instruct the jury, in substance, that the plaintiff cannot recover, in this action, for partnership items, unless the partnership accounts were settled, and balance struck, and a promise to pay, before bringing this suit.

Which instruction the COURT gave.

Whereupon *Mr. Jones*, for the plaintiff, prayed the Court, in substance, that if the joint interest in any particular articles was severed before the bringing of the suit, the plaintiff might, in this action, recover for such articles.

Which instruction, also, the COURT gave, (*nem. con.*)

The jury not being able to agree, a juror was withdrawn, by consent, and the cause was continued to the next term, December, 1827, when the plaintiff withdrew his action.

ALICE TOLMIE'S LESSEE v. JAMES THOMPSON.

Where proceedings are under the general and ordinary jurisdiction of the Court, as a court of law or a court of equity, many things may be presumed which do not appear upon the record, and evidence will not be permitted, to contradict the presumptions arising from the acts of the Court. But if the proceedings be under a special authority, delegated to the Court in a particular case and not under its general jurisdiction, as a court of common law or of equity, nothing material can be presumed; and the person claiming title under such proceedings must show them to be regular, and to be in a case in which the Court had jurisdiction, and was authorized to do what it has done.

The proceedings for the partition or sale of the real estate of an intestate, under the Maryland Act of Descents, 1786, c. 45, § 8, are under a special jurisdiction given to a county court in a particular case, and every thing necessary to their validity must be proved.

A sale under that statute is the act of the commissioners, not of the Court, and, to be valid, must be ratified by the Court; and such ratification must be absolute, not dependent upon an act to be done *in pais*.

If all the heirs are minors at the time of the sale, it is void.

EJECTMENT by the lessees of the heirs of Robert Tolmie, against the defendant, James Thompson, tenant in possession, claiming in right of his wife, who purchased the property (lot 14, in square 290, in Washington,) at a sale made in 1814, by commissioners under the Maryland Act of Descents, 1786, c. 45, § 8; and the case turned upon the validity of that sale.

By that act it is enacted, "That in case the parties entitled to the intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, an application may be made to the court of the county where the estate lies, and the court shall appoint and issue a commission to five discreet and sensible men, who, before they act, shall take an oath, to be annexed to the commission, well and truly, and without favor, partiality, or prejudice, to adjudge and determine whether the estate will admit of being divided, without injury and loss to all the parties entitled, and to ascertain the value of such estate in current money; and if the estate can, in the opinion and judgment of the commissioners, or a majority of them, be divided, without loss and injury to all the parties entitled, that they will then divide and make partition of the same, fairly and equally in value between all the parties interested, according to their several just proportions; and if the said commissioners, or a majority of them, shall determine that the estate cannot be divided, without loss to all the parties, then they shall make return to the county court of their judgment, and the reasons upon which the same is formed, and the real value of the estate in current money; and if the judgment of the commissioners shall be confirmed by the county court, then the eldest

son, child, or person entitled, if of age, shall have election to take the whole estate, and pay to the others their just proportions of the value in money; and if the eldest child, or person entitled, refuses to take the estate, and pay to the others money for their proportions, then the next eldest child, or person entitled, being of age, shall have the next election, and so on to the youngest child, or person entitled; and if all refuse, then the estate shall be sold under the direction of the said commissioners, or a majority of them, for money, or upon credit, as they, with a majority of the persons interested who are of age, and the guardians of such as may be minors, shall determine to be most advantageous to all concerned; and the purchase-money shall be justly divided among the several persons interested, according to their respective titles to the estate. But if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold until the eldest arrives to age, and the profits of the estate shall be equally divided in the mean time."

The act then provides for the case where the lands may, in the opinion of the commissioners, be divided without loss, &c., and directs them to divide and allot the same to the respective parties, and return their proceedings to the next county court, "which shall be ratified or rejected as justice shall dictate;" "and either party may appeal to the Chancellor from the judgment of the county court."

"If the lands lie in different counties, then application may be made to the Chancellor, who shall appoint commissioners," who "shall proceed in the same manner," &c.; "and in the execution of this act reasonable notice shall always be given by the commissioners to all parties concerned, before any proceeding is had; and if any minor is interested who hath not a guardian, then the court from which the commission issues shall appoint a guardian for the purpose; and no proceedings of the commissioners shall be set aside for matter of form."

The Act of Maryland, 1797, c. 114, § 6, provides "that all sales, by the act to direct descents, directed to be made of lands which will not admit of division amongst the heirs, shall be made agreeably to the order of the court from which the commissions issued, and shall not be valid until ratified by the said court."

In the preamble to the Act of Maryland, 1799, c. 49, it is said to be "expedient and proper that deeds of conveyance should be executed and acknowledged to purchasers, in those cases wherein it becomes necessary for commissioners to make sale of the intestate's estates, as manifesting the best evidence of their title, in future times." And by the third section it is enacted,

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“that in all cases of sale made by the said commissioners, after the same shall be ratified by the respective county courts, or Chancellor, and the terms of sale shall have been complied with, by the purchaser or purchasers having paid the purchase-money, agreeably to the said terms of sale, it shall then be the duty of the commissioners, or the majority of them, or the survivors or survivor of them, to make over unto the purchaser or purchasers, by deed duly executed and acknowledged according to law, all the right, title, interest, claim, and estate of the deceased intestate to the land and premises sold by them in virtue of their commission; and the commission and proceedings thereon shall be recited in the preamble of the respective deeds; and every such deed shall be recorded within the time now limited by law.” And by the fourth section it is enacted, “that when the estate of an intestate shall be sold on a credit, bonds shall be taken for the purchase-money, from the purchaser or purchasers, by the commissioners, with security, if required, and made payable to each representative respectively, according to his or her proportionable part of the net amount of sales.”

Upon the trial of this cause, it was agreed by the parties that the jury should find their verdict for the plaintiff, subject to the opinion of the Court upon the following case agreed:—

That Robert Tolmie died intestate, seized in fee of the lot in question, in the year 1805, leaving Margaret, Alice, and James Tolmie, his children and only heirs at law, who were then infants under the age of twenty-one years, and who entered and continued in possession until some time in the year 1814. That Margaret was the eldest of the said infants, and that she intermarried with one Francis Beveridge, and has since died, leaving three children, to wit, Margaret Beveridge, Hannah Beveridge, and James Beveridge, who are named among the lessors of the plaintiff. That James Tolmie aforesaid also died after the death of the said Margaret, his sister, intestate, under age, and unmarried, prior to the commencement of this suit, leaving the said Alice, his sister, and the said three children of Margaret, his heirs at law. That the said Margaret Tolmie was seventeen years of age at the time of her said marriage, which was in 1812, and was an infant under the age of twenty-one years at the time of the sale made by the commissioners hereinafter mentioned. That her husband, the said Francis Beveridge, some time in the year 1814 or 1815, went away, leaving his family residents in the city of Washington, and has never been heard of for several years, and is generally believed by his family and friends to be dead.

That the defendant has possession of the property, and has

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held possession thereof since the year 1814, when Julia Kean, now the wife of the defendant, became the purchaser of the same, at a public sale made by certain commissioners under the proceedings following:—

“To the Honorable the Judges of the Circuit Court of the District of Columbia, sitting for the county of Washington.

“The petition of Francis Beveridge and Margaret his wife, and of Alice Tolmie and James Tolmie, infants, by Margaret Tolmie their guardian, mother, and next friend, all of said county, respectfully sheweth:—

“That Robert Tolmie, late of said county, deceased, died intestate, leaving the said Margaret his widow; also the following children and heirs at law, to wit, Margaret, since intermarried with said Francis Beveridge, said Alice Tolmie, and James Tolmie, which said Alice and James are infants under the age of twenty-one years. That said Robert Tolmie died seized in fee of lot number fourteen in square number two hundred and ninety, in the city of Washington, with its appurtenances. That the said lot has descended in coparcenery to the said parties, who are desirous of having the same divided among them; they therefore pray that a commission may issue to commissioners as directed by law, for the purpose of ascertaining whether the said property be susceptible of division, or of selling the same and dividing the proceeds. That for that purpose, guardians may be assigned by this Court to said infants, and such other order made in the premises as to this Honorable Court may appear right, and agreeable to the act in such cases made and provided. They beg leave to refer to the deed for said lot now filed and exhibited; and will ever pray, &c. John Hewitt, Solicitor for Petitioners. June term, 1814.”

This petition was filed on the 15th of June, 1814; and on the same day Margaret Tolmie, the mother, was appointed guardian of the infant petitioners, and a commission was issued to David Appler, David Shoemaker, David Ott, Samuel Hoyt, and Clotworthy Stephenson, in the usual form, “to adjudge and determine whether the lot of ground aforesaid will admit of being divided without injury and loss to all the parties entitled; and to ascertain the value of said lot in current money; and that if the said lot can be divided, then to divide and make partition of the same between all the parties interested according to their several just proportions; and if the said lot cannot be divided without loss to all the said parties, to return the same to the said Court, with the reasons thereof, and the real value of the said lot in current money, according to the Act of Assembly of Maryland in such cases made and provided.”

On the back of this commission was a certificate of a justice of the peace, that on the 17th of June, 1814, the commissioners were duly sworn and affirmed, "that they will well and truly and without favor, partiality, or prejudice, adjudge and determine whether the estate within mentioned will admit of being divided without any injury or loss to all the parties entitled; and that they will ascertain the value of such estate in current money; and if the estate can, in their opinion and judgment, or in the opinion and judgment of a majority of them, be divided without loss and injury to all the parties entitled, that then they will divide and make partition of the same fairly and equally in value between all the parties interested according to their several just proportions."

On the 20th of June, 1814, the commissioners reported that they had taken the oath, &c., and after having given reasonable notice to all the parties concerned, they met, and having made an accurate survey and view of the said estate, they "adjudged and determined that the estate would not admit of a division without injury to all the parties concerned;" and stated the reason of their opinion to be that the property consisted of a single lot, on which was built a small frame building; they therefore recommended a sale of the premises, and valued the same at \$1400 in current money.

On the 6th of July, 1814, the heirs respectively and successively refused to take the estate at the valuation, and thereupon the following order was made by the Court:—

"The commissioners appointed in this case having returned to the Court, that the property mentioned in the petition will not admit of a division without loss to all the parties concerned; and all the said parties having refused to take the same at the valuation and pay the others their respective proportions; it is therefore adjudged and ordered by the Court, that the said commissioners, or a majority of them, proceed to sell the said property at public auction; that they give ten days previous notice of the time, place, and terms of sale by advertisement inserted four times in the National Intelligencer, and three times in a Georgetown newspaper; that the terms be one fourth of the purchase-money cash; one fourth on a credit of three months; one fourth on a credit of six months; and the remaining fourth on a credit of nine months, from the day of sale, taking bonds with good security to the heirs according to their several interests, bearing interest from the day of sale."

Among the papers in the cause is the following, not marked by the clerk as filed, nor noted upon the clerk's docket:—

"To the Honorable the Judges of the Circuit Court for the county of Washington.

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"The undersigned, a majority of the commissioners appointed by this Honorable Court, at June term last, to sell a certain house and lot in Washington city, being lot number fourteen, in square number two hundred and ninety, as the estate of the heirs at law and representatives of Robert Tolmie, deceased, beg leave to report, that having, according to order, advertised the same for ten days in the National Intelligencer, and three times in a Georgetown newspaper, they did proceed the same on the thirtieth day of July last on the premises; at which said Julia Kean being the highest bidder, for the sum of eleven hundred and five dollars, on a credit of three, six, and nine months; one fourth being paid in hand; that she gave due security for the payment of the purchase-money; all which has been duly paid with interest; they therefore request that the said sale be ratified; and that they may be directed to distribute the proceeds, and to make a conveyance to the purchaser aforesaid. They herewith submit an account of the expenditures.

"Given under the hands of us, a majority of the commissioners, this third day of July, in the year one thousand eight hundred and fifteen.

DAVID APPLER. [seal]

DAVID SHOEMAKER. [seal]

DAVID OTT. [seal]."

On the 3d of July, 1815, the following order was made by the Court:—

"Ordered by the Court, that the report of the commissioners returned and filed in this case be, and the same is hereby ratified and confirmed, so soon as proper receipts of the parties are produced before one of the judges of this Court, and that the commissioners or a majority of them make a sufficient deed in fee to the purchaser."

On the 13th of June, 1816, the same majority of the commissioners made a deed of bargain and sale of the lot to the purchaser, "Julia Kaine," with the following preamble:—

"Whereas by a decree of the Circuit Court of the county of Washington, in the District of Columbia, sitting as a court of chancery, rendered in June term, one thousand eight hundred and fourteen, David Appler, David Ott, David Shoemaker, Samuel Hoyt, and Clotworthy Stephenson, were appointed commissioners, and they, or a majority of them were authorized and empowered to sell and dispose of a piece of ground, known and distinguished on the plan of the said city of Washington as lot numbered fourteen, in square numbered two hundred and ninety, being the real estate of Robert Tolmie, late of the said city of Washington, deceased. That in pursuance of the said decree the said David Appler, David Ott, and David Shoemaker, being

a majority of the said commissioners did, on the thirtieth day of July, in the year of our Lord one thousand eight hundred and fourteen, sell and dispose of, to the above-named Julia, the above described lot or parcel of ground, for the sum of one thousand and seventy dollars; and whereas the purchase-money for the said lot of ground hath been fully paid and satisfied; and the said David Appler, David Ott, and David Shoemaker, being a majority of said commissioners are authorized and empowered by the said decree to execute a conveyance for the same, and to comply with the terms of the said decree, the said David Appler, David Ott, and David Shoemaker, being a majority, have agreed to execute these presents. Now this indenture witnesseth," &c.

This deed was duly acknowledged and recorded.

"Upon the facts above stated, and the sale and proceedings, and deed therein mentioned, it is submitted to the Court to decide,

"Whether the plaintiffs are entitled to recover the said premises."

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows:—

The title set up under these proceedings is said to be void.

1st. Because none of the heirs was of full age at the time of the sale.

2d. Because the sale was never ratified by the Court.

3d. Because bonds for the purchase-money were not taken payable to each representative respectively according to his proportionable part of the net amount of sales; and

4th. Because the deed does not recite the commission and all the proceedings thereon necessary to show a good title.

1. Upon the first point, the fact is admitted by the state of the case, or necessarily inferred from the facts therein stated. Margaret, the eldest of the heirs, was only 17 years old when she was married in 1812; consequently could be only 19 at the time of the sale.

But it is said that this was a judicial sale, made by order of this Court; and the Court would not have ordered the sale unless satisfied that one at least of the heirs was of full age. That it is a proceeding in Chancery; and that a purchaser under a sale by a master, under a decree in Chancery, has a good title unless implicated in fraud in the sale. 2 Schoales & Lefroy, 572.

That a sale of land under execution on an erroneous judgment is good, although the judgment be afterwards reversed. That a judicial proceeding cannot be questioned collaterally. And it has been said to be immaterial whether the wife were of full age or not, as the husband was the "person entitled" to elect, and he is to be presumed to be of full age, unless the contrary appear.

That he is "the person entitled" within the meaning of the statute. That a purchaser (of full age) of an infant's share, would be entitled to elect, although the heir from whom he purchased, be an infant; and that upon such election the purchaser would take the estate in his own right. *Stevens v. Richardson*, 6 Har. & John. 156.

On the contrary it has been argued for the plaintiff, that this is not a proceeding in chancery, nor in equity, but at law. That it is a particular proceeding authorized only in a particular case, and that all the circumstances which constitute that particular case must appear upon the face of the proceedings, or the Court would have no authority to order the sale. That *quoad hoc* this is a court of limited jurisdiction. That it is a proceeding in derogation of the common law, and therefore must be construed strictly; and the following cases have been cited. *Williams v. Peyton*, 4 Wheat, 77, which was upon a collector's sale for taxes. *Jarret's Lessee v. Cooley*, 6 Har. & John. 258, which was a case of election under the 8th section of the "Act directing Descents" 1786, ch. 45. *Wicke's Lessee v. Caulk*, 5 Har. & John. 36, which was a case under the statute of Maryland, 1718, ch. 18, "for ascertaining the bounds of lands;" and *Shivers v. Wilson*, *Garnishee of Walker*, 5 Har. & John. 130, which was a case under the act of Maryland, 1795, ch. 56, regulating the manner of issuing attachments. (See also *McClung v. Ross*, 5 Wheaton, 119, and *Walker v. Turner*, 9 Wheat. 549.)

It was also said, that it does not appear that the husband, Francis Beveridge, was of full age, and if he were he could only elect in right of his wife; and if she had no right to elect, he had none. That none but an heir could elect. That the husband is not "the person entitled" within the meaning of the statute. That he was not entitled to the intestate's estate, but to his wife's estate. There is much weight in those arguments.

It is an important question in this cause, whether the proceedings of this Court upon a petition to divide the real estate of an intestate, under the Act of Descents, 1786, c. 45, § 3, be proceedings under a special authority delegated to this Court in a particular case, or whether they be proceedings under its general and ordinary jurisdiction, as a court of law, or a court of equity. If the latter be the case, many things may be presumed which do not appear on the record, nor in the evidence produced; nor will evidence be permitted to contradict the presumption arising from the acts of the Court as they appear upon the record. Thus, after the Court has ordered a sale, in the exercise of its general and ordinary jurisdiction, it would be presumed that the Court had satisfactory evidence of every prerequisite to justify

the Court in making the order, and such presumption would continue so long as the order of the Court should remain unreversed.

On the contrary, if the proceedings be under a special authority delegated to this Court in a particular case, and not under its general jurisdiction as a court of common law or of equity, nothing material can be presumed. The person claiming title under such proceedings must show them to be regular, and in a case in which the Court had jurisdiction, and was authorized to do what it has done.

By the Maryland Act of Descents, 1786, c. 45, § 8, the chancellor has original jurisdiction only in the case where the lands to be divided lie in different counties. If the land lie entirely in one county, the county court alone has jurisdiction of the case.

This Court therefore can exercise jurisdiction in the present case, only as being substituted for the county court. It is a special jurisdiction given to a court of law in a particular case.

The powers of the county court, under that act, are

1. To appoint the commissioners; and this upon application, they are obliged to do; they have no right to refuse.

2. To confirm or reject the report of the commissioners, in case they should report that the estate cannot be divided without loss to all parties.

3. To ratify or reject the proceedings of the commissioners in case they should proceed to make partition and allotment between the parties. Either party may appeal to the chancellor from the judgment of the county court.

The power to make the partition, and all the incidental powers, are by the act given directly to the commissioners. They derive no power from the Court. They have a naked authority without an interest. Their powers must be as strictly executed as those of a collector of taxes, or any other public agent. The Court cannot authorize any other person to make the division or the sale, and no sale can be made unless some one of the persons entitled to the estate be of full age. The commissioners, with a majority of the persons interested, are to determine whether the sale shall be for money or on credit; and if for money, the commissioners are to divide it among the heirs.

The Act of 1797, c. 114, § 6, provides that all sales directed by the 8th section of the Act of 1786, ch. 45, to be made, shall be made agreeably to the order of the Court.

This act does not necessarily repeal that part of the 8th section of the Act of 1786, ch. 45, which gives power to the commissioners, with a majority of the persons interested, to decide whether the sale shall be for money or on credit. There is

enough left for the order of the Court to operate upon, in deciding whether the sale shall be made at public or private sale, and in fixing the time and place of sale, and the notice which shall be given.

The Act of 1797 also provides that the sale shall not be valid until ratified by the Court. Still, however, the power to sell is derived directly from the Act of 1786 to the commissioners. It does not pass through the Court, nor is the sale the act of the Court. It is the act of the commissioners alone, under the authority of the law, not of the court. The Act of 1786 is imperative. The words are, "then the estate shall be sold, under the direction of the said commissioners or a majority of them, for money, or upon credit, as they with a majority of the persons interested who are of age, and the guardians of such as may be minors, shall determine." It leaves no discretion to the court — it requires no order of the court for the sale. The duty is imposed on the commissioners. It is true that the Act of 1797 requires that all sales directed by the Act of 1786 to be made, should be made "agreeably to the order of the court," that is, in such time, place, and manner, but not upon such terms as to cash or credit, as the court should order. The Act of 1786 provides for the terms of sale, that is, whether for ready money or on credit; but did not provide for the time, or place, or manner of sale; it might be at public or private sale, or at long or short notice, or at any place the commissioners might appoint. In these respects, then, the Act of 1797 requires that the sales directed by the Act of 1786, to be made, should be made agreeably to the order of the court, in those particulars. The Act of 1797 evidently recognizes the construction, that the sales were to be made by the commissioners under the Act of 1786, and not under an order of the court. The Act of 1786, as before observed, is peremptory, that the land shall be sold by the commissioners, if their judgment (that it cannot be divided without loss to all the parties,) shall be confirmed by the court. The judgment thus to be revised and confirmed or rejected by the court is not a judgment that the land should be sold; but that it cannot be divided without loss. The Act of 1797, therefore, does not give the court any authority to decree, or to refuse, a sale. That clause of the Act of 1786, ch. 45, § 8, which says, "but if all the parties entitled shall be minors at the death of the intestate, the estate shall not be sold, until the eldest arrives to age," is a prohibition to the commissioners, who alone had the power to sell, and not the court, who had no power to decree a sale. All the acts of Maryland upon the subject, evidently consider the power of sale as vested immediately in the commissioners by the Act

of 1786, and as a power to be executed *in pais*. Thus the act of 1797, ch. 114, § 6, says, "that all sales by the act to direct descents directed to be made," &c. So the act of 1799, ch. 49, in § 1, says, "in those cases wherein it becomes necessary for the commissioners to make sale of the intestate's estates," and in sec. 2, "in case the lands or estate shall be sold by the commissioners agreeably to the provisions of the said act;" and in sec. 3, "in all cases of sale made by the said commissioners," &c. "it shall be the duty of the commissioners," &c. The 4th section requires that bonds shall be taken "by the commissioners." The 5th section authorizes them to lay off the widow's dower; and the 6th section empowers them, with the assent of the widow, to sell the estate disincumbered of her dower.

These powers are all vested by the statute directly in the commissioners, without the intervention of the court; and no power is given to the court, but to ratify or reject the acts of the commissioners.

The act of 1799, ch. 49, provides for the payment of the expenses of executing the commission, and their allowance by the court. It makes it the duty of the commissioners, without any order of the court therefor, after ratification of the sale and payment of the purchase-money, to make a deed to the purchaser, conveying all the right of the intestate; and requires that the commission and proceedings thereon should be recited in the preamble of the deed. It also provides, that when the sale shall be on credit the commissioners shall take bonds for the purchase-money payable to each representative respectively, according to his proportion of the amount of sales.

Before this statute, the commissioners had no power to make a deed, nor any interest which they could convey. Their deed would have been a mere nullity. The purchaser's title rested upon the matter *in pais*, connected with the record of such acts of the court and of the commissioners as were required to be entered of record. The matters required to be recorded were only, 1st. The judgment of the commissioners that the estate could not be divided without loss to all the parties interested, the reasons of such judgment, and the confirmation of that judgment by the court; and 2d. The partition actually made by the commissioners, in case they proceeded to divide the estate, and the ratification or rejection by the court of such partition. The sale, if made, was a matter entirely *in pais*, of which no report, nor record, nor ratification, was required to be made.

The purchaser was left to make out his title, by proof of all the facts necessary to give jurisdiction to the commissioners,

and to the court, as far as it had power to act in the case, and to show that the authority given by the statute had been strictly pursued and executed. If the commissioners made a deed it was of no value, unless as a memorandum of dates and facts, which might be susceptible of proof by evidence *aliunde*.

In case of a sale under the Act of 1786, the purchaser, to make out his title, was bound to prove that the ancestor died seized of an estate of inheritance, and intestate; that the parties entitled to the estate could not agree upon a division thereof, or that some person entitled to a part was a minor; that application was made to the court; that a commission was issued; that the commissioners took the oath required by the statute; that they determined that the estate could not be divided without loss to all the parties; that they made return to the court of their judgment, and the reasons upon which the same was formed, and the real value of the estate in current money; that their judgment was confirmed by the court; that all the persons entitled to elect to take the whole estate and pay to the others their just proportions of the value in money, refused so to do; that the sale was made under the direction of the commissioners, or a majority of them, for money, or upon credit, as they, with a majority of the persons interested who were of full age, and the guardians of such as were minors, determined to be most advantageous to all concerned; that some one, at least, of the parties entitled, was of full age at the time of the sale; and, perhaps, that the purchase-money was justly divided among the several persons interested, according to their respective titles to the estate.

The statutes of 1797 and 1799 have not altered the nature of the source of the power of sale, vested in the commissioners. They still derive it immediately from the statute of 1786. It does not flow through the court; and cannot be hindered or obstructed by the court, unless incidentally, by its refusal to appoint the time, place, and manner in which the sale shall be made, or by its refusal to ratify the same after it has been made. The power of sale is still an authority vested by law in the commissioners, to be executed by them *in pais*.

"It is a naked power, not coupled with an interest; and in all such cases," (says Mr. C. J. Marshall, in delivering the opinion of the Supreme Court of the United States, in the case of *Williams v. Peyton*, 4 Wheat. 79,) "the law requires that every prerequisite to the exercise of that power must precede its exercise, or his act will not be sustained by it." And again he says, "It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the valid-

ity of a deed depend upon an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser; and the evidence of them should be preserved, as a necessary muniment of his title."

In *Thatcher v. Powell*, 6 Wheat. 127, Mr. C. J. Marshall again, in delivering the opinion of the court, says:—"We think otherwise," (that is, that the sale was void, and not merely voidable.) "In summary proceedings, where the court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed; and those facts, especially, which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*." See also *Hartley v. Hooker*, Cowp. 528.

What is there to prevent these general principles from being applicable to the present case?

1. It is said that this is a judicial sale, and that, in such cases, every thing necessary to the jurisdiction of the court, and validity of the sale, is to be presumed; and to this point was cited the Irish case of *Bennett v. Hamill*, 2 Schoales & Lefroy, 572.

That was a case where the heir, after coming of age, sought, by petition, to set aside a sale made twenty years before, under a decree in equity at the suit of a creditor of his ancestor, suggesting a deficiency of personal assets, and praying for a sale of the real estate for the payment of debts. The petition suggested fraud between the creditor and the mother of the complainant and her advisers. The purchaser, however, was entirely ignorant of the fraud, and purchased *bonâ fide* for a fair price, and had obtained the legal estate from the person in whom it was outstanding at the time of the sale. Lord Redesdale, after much argument and consideration, finally decided that as the defendant, Hamill, was a *bonâ fide* purchaser, for a fair price, without notice or knowledge of the fraud, and had obtained the legal title, and had laid out \$1,200 on the land, he ought not to be disturbed in his title; but that the complainant might pursue his remedy against the creditor, and the other parties concerned in the fraud.

That case confirms the distinction before noticed, between the judicial act of a court in the exercise of its general jurisdiction, and the execution of a naked power under an authority given in a special case.

In the case of *Bennett v. Hamill*, the sale which was sought to be set aside was made under a decree of a court of equity, in the exercise of its ordinary and general jurisdiction under the Irish law. All the presumptions were, therefore, in favor of the decree. But, in the present case, the sale was not made under the authority of the court in the exercise of its general jurisdiction, but under a special authority vested by law in certain commissioners; and, therefore, is not entitled to any presumptions in its favor. Every thing necessary to its validity must be proved.

It is also said that a sale under a *fi. fa.* is valid, although the judgment be afterwards reversed for error. 8 Co. 96, b. But the reason given is, "for the sheriff who made the sale had lawful authority to sell; and, by the sale, the vendee had an absolute property in the term during the life of Alice, the wife; and although the judgment, which was the warrant of the *fi. fa.* be afterwards reversed, yet the sale, which was a collateral act done by the sheriff by force of the *fi. fa.*, shall not be avoided; for the judgment was that the plaintiff should recover his debt, and the *fi. fa.* is to levy it of the defendant's goods and chattels; by force of which the sheriff sold the term, and the vendee paid money to the value of it. And if the sale of the term should be avoided, the vendee would lose his term and his money too, and thereupon great inconvenience would follow; that none would buy of the sheriff goods or chattels in such cases, and so execution of judgment, (which is the life of the law,) in such case, would not be done." And in 8 Co. 143 a, the reason given is, "Because the sheriff was commanded and compelled by the king's writ to sell it."

In that case, the authority to sell was complete and perfect at the time of the sale; for an erroneous judgment remains in full force until reversed. But in the present case the question is, whether, at the time of the sale, the commissioners had authority to sell; and whether, in making the sale, they pursued their authority strictly. There is no analogy between the cases. In *Drury's case*, 8 Co. 142 a, a "difference was taken and agreed between a thing collateral executory and executed; for when an erroneous judgment is given, and afterwards the judgment is reversed by a writ of error, collateral acts executory are barred thereby;" for, after reversal, the party may plead *nul tiel record*. But until the erroneous judgment be reversed, the party cannot take advantage of the error; for he cannot plead *nul tiel record*, although there be apparent error. And collateral things, executed before the reversal, remain in force, notwithstanding the subsequent reversal of the original judgment; and the rea-

son is, because in the latter case the authority was complete at the time of the act done ; and in the other case there was no authority.

There is also a difference between judgments which are erroneous and judgments which are void.

The judgment of a court, in a case in which it has not jurisdiction, is void ; and no act done under it can be valid. *Borden v. Fitch*, 15 Johns. 121.

Thus in the case of *Wise v. Withers*, 3 Cranch, 331, which was trespass by a justice of the peace against a collector of militia fines, the Supreme Court of the United States decided that, as the plaintiff was not liable to be enrolled in the militia, the court-martial had no jurisdiction in the case, and its judgment was void, and gave the collector no authority to distrain the plaintiff's goods. See also *Bissell v. Briggs*, 9 Mass. Rep. 462.

All the cases rest upon the authority to do the act at the time it was done. The difference among them consists in the evidence required of that authority.

In *Kempe's Lessee v. Kennedy*, 5 Cranch, 173, 179, 184, the Supreme Court held, that when a court of general jurisdiction acted within the sphere of its authority, its proceedings were not examinable when coming before them collaterally ; but that where the jurisdiction is limited, it must be shown upon the record itself that the court acted within the sphere of its authority.

The case of *Barney v. Patterson*, 6 Har. & John. 182, was an action of ejectment by a purchaser at the marshal's sale by virtue of a *fi. fa.* issued upon a judgment of the Circuit Court of the United States, in an attachment upon two *non ests*, under the Act of Maryland, 1750, c. 40. Many objections were made to the jurisdiction of the court, and to the regularity of the proceedings in the attachment.

Mr. C. J. Buchanan, in delivering the opinion of the Court of Appeals of Maryland, said, " But, though the intervening of a term before the issuing of the attachment, and the negligence of the marshal, were irregularities in the proceedings, the judgment of condemnation is not therefore void, (whatever disposition might be made of it by an appellate court,) the Circuit Court being a court of record of competent jurisdiction, from whose decisions an appeal or writ of error lies to the Supreme Court of the United States, and is not an inferior court according to the technical sense of the term as used in England.

" It is not like the case of special and extraordinary powers given by statute to a court in relation to a subject-matter of which such court has no jurisdiction independent of the statute,

Tolmie's Lessee v. Thompson.

but derives its authority to act upon facts arising *in pais* entirely from the statute giving the power, and prescribing the mode of proceeding. The act upon which the proceedings of the Circuit Court were founded, professes to give no new jurisdiction, but only to regulate and limit the powers of courts already possessed of full and complete jurisdiction of the whole subject-matter." There is no presumption in favor of a court of limited jurisdiction. *Perkin v. Proctor & Green*, 2 Wil. 382. And "where, by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued; and appear to be so upon the face of their proceedings. *Rex v. Croke*, Cowp. 26, 29."

The case of *Perkin v. Proctor & Green*, 2 Wils. 382, was trespass against the assignees of Goodall, a supposed bankrupt, for acts done by the assignees under a void commission of bankruptcy; Goodall having been a victualler, and not a trader, liable to the bankrupt laws. The Court of Common Pleas decided that the commission was not merely voidable, but void; and that all acts done under it, even before it was superseded by the Lord Chancellor's order, were absolutely void. The Court said, "We are all of opinion that the commission of bankruptcy is void, and of no avail. The jurisdiction concerning bankrupts is confined to particular persons and cases; as that the person subject to a commission, must be a trader; must be indebted in such a sum; must do some particular act, &c. &c."

"The Court of Chancery acts herein solely upon the application of the party petitioning, at whose peril the commission issues, and if he sues it out on any false suggestion the law gives a remedy against him to the party whose liberty or property is thereby invaded."

"There are a variety of commissioners whose power and jurisdiction are limited and confined, which, if they exceed, the law will give remedy against them. And where courts of justice assume a jurisdiction which they have not, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice*. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing; this is the very case of the Marshalsea, (10 Co. 76 a.) The party in this case is no trader; there is no foundation to build a commission upon; the commissioners had no power at all. Where a rate is unduly taxed, the warrant of the justices of the peace for levying thereof will not excuse the church-warden, or overseer of the poor, who distrains for it. *Nicholls v. Walker & Parker*, Cro. Car. 395. And it is like where an officer makes an arrest by warrant out of the King's Court, which, if it be error, the

officer must not contradict, because the court hath general jurisdiction; but here" (says Justice Croke,) "the justices of the peace have but a particular jurisdiction. The case of *Terry v. Huntington et al.*, Hard. 480, is a very strong case. In trover for goods levied by warrant of the commissioners of excise, the question was, if they adjudge low wines to be strong waters perfectly made upon the statute 12 C. 2, c. 23, whether an action lies against the officer. *Per* Hale, Lord Chief Baron. The commissioners have only a stinted, limited jurisdiction, and if they exceed it, that does not take away the jurisdiction of this court. Special jurisdictions are circumscribed, 1. With respect to place, as a leet, or a corporation. 2. With respect to persons, as 10 Rep. the case of the Marshalsea. 3. With respect to the subject-matter of their jurisdiction; and the statute limits their jurisdiction in all these three respects; and therefore if they give judgment in a cause arising in another place; or betwixt private persons; or in other matters, all is void and *coram non judice*; as if they should adjudge rose-water to be strong water." The court also cited the case of *Smith v. Bouchier et al.*, in which an action for false imprisonment was maintained against the Vice-Chancellor of Oxford, who had issued his warrant upon oath of suspicion when, by law, he was not authorized to issue it but upon oath of belief; the whole proceeding was adjudged to be "*coram non judice*, and a mere nullity."

In the case of *Wicks v. Caulk*, 5 Har. & John. 42, the Court of Appeals in Maryland, say, "It is a well-established principle of law, that the proceedings of any tribunal not having jurisdiction over the subject-matter which it professes to decide, are void; and it is equally well established that the proceedings of tribunals of limited jurisdiction, must, on the face of them, state the facts which are necessary to give them jurisdiction." "That the proceedings of tribunals, having no jurisdiction to decide the case, are not voidable, but void, is a proposition equally clear; and, among other cases, was established in this court in the case of *Patridge v. Dorsey's Lessee*, at December term, 1813, where the Court decided that a plaintiff, in an ejectment, might show that a decree of the Chancellor, ordering lands to be conveyed in a case where he had no jurisdiction to make such a decree, was void, and therefore could give no title, though such decree had not been appealed from, or reversed.

"If the proceedings exhibit a case in which the commissioners who did act, had power to act, their award is final, until reversed in the manner prescribed by the act; but if, on the contrary, they themselves show that they had no jurisdiction, the whole must be considered as *coram non judice*, and therefore a nullity."

The Court of Appeals, upon that ground, reversed the judgment of the court below, although a hundred years had elapsed since the proceedings were heard, before the commissioners, which now, for the first time, were adjudged to be void.

The case of *Shivers v. Wilson*, 5 Har. & John. 130, was under the Maryland Act of 1795, c. 56, relating to attachments. The garnishee had pleaded *non assumpsit* for his principal, and on the trial of the issue upon that plea, although the plaintiff was described in the proceedings, as a citizen of the United States, the court below instructed the jury that the plaintiff could not recover, unless he satisfied them, by evidence, that he was a citizen of the State of Maryland, or of some other of the United States; to whom alone the statute gives the remedy by attachment; and, a man may be a citizen of the United States, and yet not be a citizen of any particular State of the United States. Mr. Justice Johnson, in delivering the opinion of the Court of Appeals, says, "On the part of the appellant it is contended, that as the court before whom the cause was depending, had a general, and not a limited jurisdiction over the matter in contest, no advantage could be taken of the plaintiff's incapacity to sue, except by a plea in abatement.

"No position of law is more clearly established than that a defendant in a cause, before a court of general jurisdiction, must, if he wishes to avail himself of the disability of the plaintiff to sue, do so by a plea in abatement; and no principle of law is more evident than that where the tribunal is of a limited jurisdiction, or the proceedings are particularly prescribed by a statute made on the subject, the course of procedure, so prescribed, must, on the face of the record, appear to have been, if not literally, at least substantially complied with; or the case must, by the proceedings, disclose itself to be within the limited jurisdiction." "On these principles rest the numerous decisions on the acts for marking and bounding lands, made by the late general court, and all the courts of the State, of original jurisdiction, and which have been universally acquiesced in."

"These decisions rest on the principle that where the course of procedure is prescribed by the statute, the proceedings themselves must show their conformity with the act by which they are authorized, and that otherwise advantage of non-conformity, can, at any time, be taken." "The Act of 1795, c. 56, under which the proceedings in this case are supposed to be protected, gives, it is true, full and entire jurisdiction in all cases of attachments coming within the purview of the act, yet that entire jurisdiction is confined to such cases as the act embraces. If the act comprehends the case at bar, then no exception to the disability

of the plaintiff was available, except by plea in abatement; if, on the contrary, that act extends not to the case, the plaintiff had no right to recover, and the decision against him was correct. The Act of Assembly needs only to be read, to discover its limited operation. It gives not the right to every person to issue, or cause attachments to issue. Its provisions confine the remedy to citizens of this State, or of some other of the United States; and the manner in which they are to proceed, is, in detail, pointed out. The plaintiff, to succeed under that law, must come within its provisions. The plaintiff, to recover under that act, must follow its directions. The record before the court in this case, in no part of it, brings the plaintiff within that description of persons who had a right to issue, or cause the attachment to be issued. The right to condemn the property in favor of such a plaintiff is, by no law, vested in the court before whom the cause was tried, or in any other court." The judgment of the court below was affirmed.

These principles and authorities seem to be decisive of this case. The sale was the act of the commissioners, not of the court. All the parties entitled to the estate being minors at the time of the sale, the commissioners had no authority, but were expressly forbidden, by law, to sell. This objection alone is fatal.

But if the commissioners had a power to sell, at the time of the sale, it is an equally fatal objection, that it does not appear in the proceedings that the sale was ever ratified by the court, as required by the Act of 1797, ch. 114. It is true, that there was an order that the report of the sale should be ratified and confirmed, "so soon as proper receipts of the parties should be produced before one of the judges of this Court; and that the commissioners, or a majority of them, make a sufficient deed in fee to the purchaser. But it does not appear in the proceedings that such receipts were ever produced to the judge. And although a deed was afterwards made by the commissioners to the purchaser, yet as nothing material can be presumed in the execution of a special authority, the deed does not, in law, justify a presumption that the receipts were produced, especially as the deed, although required by law to contain a recital of the commission and the proceedings thereon, contains no recital of the fact that the receipts had been produced to the judge, or that the sale had been confirmed by the court. It does not even recite the commission, or the proceedings thereon. It states falsely, that by a decree of this court sitting as a court of chancery, David Appler and four others were appointed commissioners, who were authorized to sell lot 14 in square 290, being the estate of Robert Tolmie deceased, and to execute a conveyance

Higgs & Wife v. Hough.

for the same. Whereas the proceeding was not before this Court, sitting as a court of chancery, but as a court of common law, being substituted for the County Court of Maryland; and the decree did not authorize the commissioners to sell the lot, nor to execute a conveyance. There is nothing in the deed to show that it was a proceeding under the Act of Assembly, directing descents, and for the partition of an intestate estate. It does not state that Robert Tolmie died intestate and seized of an estate of inheritance in the property; nor that the parties entitled could not agree on a division thereof; nor that any of the heirs were minors; nor that application was made to the court for a commission; nor that the commissioners took the oath prescribed by the statute; nor that they determined that the estate could not be divided without loss to all the parties; nor that they made return of their judgment to the court with their reasons for such judgment; nor of their valuation of the estate; nor that their judgment was confirmed by the court; nor that all the persons entitled to elect to take the estate at the valuation had refused to do so; nor that the sale was made agreeably to the order of the court; nor whether the sale was for money or on credit; nor whether the money had been duly divided among the persons entitled to it; nor whether the bonds were taken payable to the respective heirs agreeably to the statute; nor that any of the heirs was of full age; in short, it does not correctly recite any one of the facts necessary to constitute a title in the purchaser, except the payment of the purchase-money. The deed, therefore, raises no presumption of the existence of any of those facts.

The Court is of opinion,

1. That the commissioners had no authority to sell the property, because all the heirs were minors at the time of the sale; and that therefore the sale was void.

2. That the sale was not valid, because it does not appear to have been ratified and confirmed by the Court. See also *Thomans v. Wilson*, 5 Har. & John. 132.

Verdict and judgment for the plaintiff. *Mr. Redin* and *Mr. Key* for plaintiff. *Mr. C. C. Lee* and *Mr. Jones* for defendant.

Reversed by the Sup. Court, 2 Peters, 157.

HIGGS & WIFE v. HEUGH.

In an affidavit for continuance of a cause on account of the absence of a witness, it is not necessary to state the particular circumstances of diligence used by the party to obtain the testimony of such witness. They may be proved *ore tenus*.

Mr. Jones, for the plaintiff, moved for a continuance of the cause, on affidavit of the plaintiff, *Higgs*, which stated, "that a witness in behalf of the plaintiffs in said suit, to wit, *Turbett R. Belton*, whose testimony is material, competent, and proper in the said suit, is really wanting from West Florida, and that the plaintiffs have used their proper and reasonable endeavors, to procure the testimony of the said witness, and this deponent verily believes that the said cause cannot be tried with justice to the plaintiffs, without such testimony, and he has a reasonable expectation and belief, that the testimony of the said witness can be procured at the next regular session of this Court." The affidavit then stated the particular facts which it was expected the witness would prove.

Mr. Key, for the defendant, objected that it did not appear, by the affidavit, what particular endeavors the plaintiffs had made to obtain the testimony of the witness.

The Court (*nem con.*) said, that the practice of the Court has not been to require the particular circumstances of diligence to be stated in the affidavit, but to examine the party, or his counsel either upon oath or otherwise to the satisfaction of the Court as to the particular endeavors to obtain the testimony; and, in the present case, being satisfied by *Mr. Jones's* verbal statement, that reasonable diligence had been used, they continued the cause.

CORCORAN v. BROWN *et al.*

If the vendor in a deed of land, has no title at the date of the deed, but acquires a good title afterward, the title thus acquired, enures to the benefit of the first vendee against a subsequent vendee who claims by a deed made after the title accrued to the vendor; and the vendor and all who claim under him, are estopped by his deed to deny that the vendor had title at the date of the first deed.

THE facts of this case, were, that on the 9th of October, 1822, *Robert Easter* made his deed of bargain and sale to *Henry Addison*, purporting to convey a house and lot in Washington to the said *H. Addison* and his heirs, to have and to hold to the said "*Henry Addison*, his heirs and assigns, to and for the uses, trusts, and purposes following, and to and for no other use, intent, or purpose whatever," that is to say, to secure a debt of about \$300 and interest due by *Easter* to *Corcoran*. This deed was duly acknowledged and recorded.

That the plaintiff recovered judgment at law against *Easter* for the whole amount of the debt, no part of which has yet been paid. That at the time of the execution and delivery of the

said deed, "Easter had no title whatever in the said premises ;" which want of title was unknown to the plaintiff, but that Easter, afterwards, viz. on the 28th of March, 1823, acquired a legal title in fee-simple in and to the premises by a deed from one Larned.

That Easter afterwards, viz. on the 8th of August, 1823, being indebted to Mr. J. Q. Adams in \$3000, by a deed duly executed, acknowledged, and recorded, mortgaged the same premises to Mr. Adams for the payment of the said sum of \$3000 and interest, by instalments, the last of which was to become payable on the 8th of August, 1827.

That on the 21st of March, 1825, Easter applied to a judge for the benefit of the insolvent law, which was granted, and Robert Brown, the defendant, was duly appointed trustee under the insolvent act ; and in pursuance of the order of the judge, sold, on the 28th of October, 1825, "all the right, title, and interest of Robert Easter to the following described property in the city of Washington, to wit, one house and lot, being the subdivision of lots numbered 2, 3, 4, in square number 380, subject to a mortgage of \$3000, payable in three annual instalments of \$1000 each, the first of which became due on the 9th of August last." These terms were contained in the printed advertisement of the sale ; which contained no allusion to any other incumbrance.

That the premises were struck off to Nathaniel Fry, Jun., bidding for Mr. Adams, at the sum of \$900 ; and on the 7th of November 1825, Robert Brown, the trustee, made a deed of bargain and sale to Mr. Adams, duly acknowledged and recorded, reciting the proceedings under the insolvent law ; the appointment of Brown as trustee ; the sale by order of the judge and the payment of the purchase-money, and purporting to convey to Mr. Adams and his heirs and assigns, "all the right, title, interest, and estate whatsoever of him the said Robert Easter, in and to the above lot or piece or parcel of ground."

At the foot of this deed was a certificate of the judge that the sale had been made according to his directions, and he ratified and confirmed it.

Mr. Adams, in his answer, denies notice of Corcoran's claim and lien at any time before the sale by the trustee ; and states that the deed from Larned to Easter was not recorded until after the deed from Easter to him was made ; but was recorded before the latter, and all in due time.

The answer of Brown, the trustee, states, that he himself did not know of Corcoran's claim until the day of the sale ; and that, although the printed terms of sale do not contain the con-

dition or proviso that the premises were sold subject to the complainant's claim, yet that condition or proviso, at the time of and before the sale, was proclaimed by the auctioneer, from his stand, in the hearing of the bidders there assembled, among whom was the said Nathaniel Frye, who heard and conversed about the same, before the sale.

To these answers there was a general replication and subpœna to rejoin; and the cause was set for hearing, by consent of the parties upon the bill, answers, replications, and exhibits.

Mr. Marbury, for the complainant, contended that the title subsequently acquired by Easter enured to the benefit of the complainant; and that Easter and all claiming under him were estopped by Easter's deed to Addison from denying that Easter had a good title at the date of that deed. *Trevivan v. Lawrence et al.* 1 Salk. 276; 1 Johns. Ch. Ca. 90. *Selby v. Magruder*, 6 Har. & Johns. 459.

Mr. Lear, for the defendant Brown and the general creditors, contended that as the property was sold subject to Corcoran's claims, he ought not to be paid out of this purchase-money, there being enough left in the hands of the purchaser to pay this claim. The general creditors are not estopped by Easter's deed. They do not claim under him, but under the insolvent law.

Mr. Hellen for Mr. Adams. The answer of Brown is not evidence against Mr. Adams, his co-defendant. There is therefore no evidence that Mr. Adams had notice of the claim of Corcoran before the sale.

CRANCH, C. J. delivered the opinion of the Court.

The bill does not charge Mr. Adams with notice of the complainant's claim at the time of his taking the mortgage. The answer of Mr. Brown is not evidence against his co-defendant Mr. Adams, and therefore cannot charge him with notice of any terms of sale different from the printed terms; and if it were, yet evidence of verbal declarations of an auctioneer at the time of the sale ought not to be admitted to contradict the printed conditions. *Gunnis et al. v. Erhart*, 1 H. Bl. 289.

The fact, therefore, must be considered as established, that Mr. Adams purchased the property at the trustee's sale, subject only to his own incumbrance; and that, if any prior incumbrance existed the trust fund was bound to pay it off, or to vacate the sale and refund his purchase-money and expenditures.

The Court is of opinion that the complainant has the first incumbrance; and that although Robert Easter, at the time of executing his deed to Henry Addison had no legal title, yet that when he subsequently acquired a legal title, it enured, (by means

of the estoppel in his deed) to the benefit of the complainant, whose trustee, H. Addison, thereby acquired the legal estate as against all persons claiming by or through Robert Easter; and that the property of the insolvent, Robert Easter, not having been sold expressly subject to the complainant's claim, the purchase-money ought, in the first place, to be applied to the discharge of that incumbrance.

Decree accordingly.

CHARLES KING v. THOMPSON *et al.*, Heirs of George King.

If the creditor, after judgment against the maker and indorser of a promissory note, give time to the maker, he does not thereby discharge the indorser.

IN EQUITY. Exception was taken to the auditor's report, in which a claim of the Bank of Columbia against an indorser was rejected, because the bank had given time to the makers of the note, after judgment against the indorser.

Mr. J. Dunlop cited *Bay v. Tallmadge*, 5 Johns. Ch. R. 315, to show that, by the judgment, the relation of principal and surety had ceased, and that indulgence to one was no discharge of the other.

Mr. C. Cox, contra, contended that any indulgence by which the creditor gave time to the principal, and thereby prevented the surety from immediate recourse to his principal, in case of payment by the surety, discharges the latter. Fell on Guaranty, c. 17, p. 217. By the Maryland Act, 1763, c. 23, § 8, the surety discharging or satisfying a judgment against the principal is entitled to an immediate assignment of the judgment against the principal, and may have instant execution thereupon. Indulgence to the principal would be in direct hostility to this right.

The COURT was of opinion that the indorser was not discharged, and sustained the exception to the report.

In the case of *Bay v. Tallmadge*, 5 Johns. Ch. R. 315, Chancellor Kent says: — "I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still existing relation of principal and surety, after judgment and execution against the bail or the surety. It becomes too late, then, to inquire into the antecedent relations between the parties. Those relations become merged in the judgment. This was expressly declared to be the case, as between the holder and maker and indorser of a promissory note, by the Supreme Court of the United States,

in *Lenox v. Prout*, 3 Wheat. 520." See also 3 Wheat. 157, in *notis*; *Fulton v. Matthews*, 15 Johns. 433; *Shubrick's Executors v. Russell*, 1 Desaussure's Rep. 315; *Pain v. Packard*, 13 Johns. 174; *Rutledge v. Greenwood*, 2 Dess. Rep. 389; *Commissioners of Berks v. Ross*, 3 Binney's Rep. 20; *Trimble v. Thorne*, 16 Johns. 152.

PHILIP MAURO AND JOSEPH FORREST v. JOHN T. RITCHIE.

An appeal from the Orphans' Court, in Washington county, D. C., will be dismissed, if the transcript of the record be not transmitted to this Court within thirty days after the order appealed from.

The Orphans' Court has a right to review its sentence, although thirty days have elapsed, and the party has lost his right of appeal from the original sentence; and from the judgment of the Orphans' Court, upon that review, an appeal lies to this Court.

The difference between a rehearing and a review is, that a rehearing may be had before enrolment of the decree, but after enrolment the party is put to his bill of review.

A petition for a review in the Orphans' Court is analogous to a bill of review in chancery.

A judgment of the Orphans' Court against the petitioner, upon demurrer to the petition for review, is, in effect, a judgment that the errors suggested in the petition for review, as apparent on the record, were not such as ought to have induced the Orphans' Court to reverse its decree; and from this judgment of the Orphans' Court the party may appeal to this Court.

The authority of a guardian appointed by the Orphans' Court, under the power given by the Maryland Act, 1798, ch. 101, c. 12, § 1, continues until the full age of the infant; and such guardian cannot be removed, unless for refusal to give security, when required by the Orphans' Court.

After a guardian has been appointed by the Orphans' Court, the infant has no right, at the age of fourteen, to choose another.

By the common law, it was only where there was a guardian in socage, or by nurture, (in which cases the guardianship continued only till fourteen,) that the infant had a right, at that age, to choose a guardian.

Different kinds of guardians: 1. In chivalry; 2. In socage; 3. By nature; 4. For nurture; 5. By statute; 6. By custom; 7. By the Chancellor; 8. By the ecclesiastical courts; 9. *Ad litem*; 10. By election.

Of the four kinds of guardians at common law, one only exists in Maryland, namely, guardian by nature.

Guardian by nature, at the common law, has no authority over the lands of the infant; but his authority over the person of the infant continues until he is of full age.

The English statutes of 4 & 5 Phil. & Mary, c. 8, and 12 Car. 2, c. 24, so far as they authorize a father, by his will to appoint a guardian to his infant children, are in force in Washington county, D. C.

Under the Maryland statutes, it seems that the guardian by nature has the custody of the estates, as well as of the person of the infant, until the age of twenty-one; but the father was the only guardian by nature recognized by those statutes.

If the infant have no father, nor testamentary guardian, the Orphans' Court has the right of appointing the guardian to any infant who has an interest in lands, by descent or devise; or is entitled to a legacy, or distributive share of the personal estate of an intestate.

By the term "natural guardian," in the Act of 1798, must be intended such a natural guardian as is entitled to the guardianship of the estate, as well as of the person of the infant.

Mauro and Forrest v. Ritchie.

The Act of 1798 does not in any manner recognize the right of the infant to choose a guardian at any age.

The Orphans' Court, whenever it has authority to appoint a guardian, may appoint him to the full age of the infant.

An infant cannot choose a guardian, nor can the Court appoint a guardian, unless the infant be personally brought into Court.

A guardian cannot be removed, without notice and citation to show cause.

APPEAL from the Orphans' Court, who had removed the appellants, (who had been duly appointed guardians of John W. Ott, an infant,) and appointed the appellee, John T. Ritchie, guardian in their place.

The case is stated in the opinion of this Court, which was delivered by CRANCH, C. J., as follows:—

On the 13th of September, 1826, Joseph Forrest and Philip Mauro, by J. Marbury, "their attorney," applied to the Orphans' Court for leave to file their petition, praying that court to review its order, granting to John T. Ritchie the guardianship of John W. Ott, to whom the petitioners had been appointed guardians in the year 1821; and that the said John T. Ritchie may be cited to answer the prayer of the petitioners. Whereupon that court ordered that leave be given as prayed, and that a citation be issued against the said Ritchie, returnable to the 20th of September, 1826.

The petition was accordingly filed, stating the appointment of the petitioners as joint guardians of John W. Ott; that they gave bond, &c.; that the said John W. Ott is still under age, being about fourteen years old, and still subject to their control and care; that on the 9th of August, 1825, John T. Ritchie, ("who, your orators pray, may be made defendant to this bill of review,") made application to be appointed guardian to the said orphan, and filed a letter from the said orphan, dated from Frederick City, in the State of Maryland, on the 14th of July, 1825, directed to the judge of the Orphans' Court of the county of Washington, in the District of Columbia, in which he represents himself to be fourteen years of age, and states that he chooses the said J. T. Ritchie as his guardian, and requests that he may be appointed. Whereupon the judge of the Orphans' Court, without notice to the petitioners, without having caused the orphan to be brought into court, and without further evidence, or other proceeding, by a decretal order appointed the said J. T. Ritchie guardian of the infant, which decretal order is signed and enrolled; that they are aggrieved thereby, and that it is erroneous, and ought to be reversed and annulled. And they assign for error:

1. Because the petitioners were appointed guardians under the Act of 1798, ch. 101, c. 12, § 1, which gives the court power to appoint a guardian for an infant until the age of twenty-one,

and that having exercised that power, by appointing the petitioners guardians of the infant till his age of twenty-one, it was not competent for the judge to remove the petitioners and appoint a new guardian except for cause shown, in the omission or neglect of duty, &c.; and if such neglect were alleged, the petitioners were entitled to be cited and heard.

2. Because the infant had no right, at the age of fourteen, to choose a guardian, having had guardians appointed until he should be twenty-one years of age.

3. Because the infant was not brought into court, and under the inspection and examination of the judge; that his age, competency to choose, and wish might be distinctly known to the judge.

4. Because the petitioners were not cited to show cause why they should not be removed, and the said Ritchie appointed guardian.

5. Because the petitioners had no notice of the application and appointment of the said Ritchie until after the said order was made, and had no opportunity to object to the same.

“For all which errors in the said decretal order your orators have brought this bill of review, and humbly conceive that they should be relieved therein.

“In tender consideration whereof, and for that there are divers errors and imperfections in the said decretal order and proceedings, by reason whereof the same ought to be reviewed and reversed, &c.; and to the end that the same may be reviewed and reversed, &c., and that the said J. T. Ritchie may answer, &c., and that your orators may be relieved according to equity and good conscience, may it please your honor to grant your orators a *subpœna* to the said J. T. Ritchie,” &c., and they file a record of the proceedings referred to.

The said J. T. Ritchie appeared on the 20th of September, 1826, and prayed further time to answer, which was given to the 27th, when he appeared by Mr. Swann his solicitor, and said, “that the bill of review, so as aforesaid exhibited against him, and the matter therein contained, are not sufficient in law to compel him to answer the said bill,” &c. “wherefore for want of a sufficient bill in this case the said John prays that the said bill may be dismissed,” &c.

And the said Joseph and Philip, by J. Marbury their attorney, say that the bill, &c., is sufficient in law, &c. &c.

The cause having been submitted to the judge of the Orphans’ Court, without argument, he decreed that the prayer of the petition could not be granted, and that the petition be dismissed with costs.

Upon which decree the petitioners appealed to this Court.

The original order, appointing the petitioners guardians, was in these words:—

“ March 21, 1821. Catharine Ott having declined the appointment of guardian to the infant children of her son, the late Doctor John Ott, it is by the court this day ordered, that Joseph Forrest and Philip Mauro, both of said county and district, be appointed joint guardians of the said orphan children of Doctor John Ott, deceased, they entering into a bond of \$20,000, for each guardianship, with William Cooper and Hanson Gassaway securities.”

On the 9th of August, 1825, John T. Ritchie made application to the court to be appointed guardian to John W. Ott, and filed the following letter:—

“ Frederick City, Frederick County, July 14th, 1825.

“ To the Honorable Mr. Lee, Judge of the Orphans’ Court for Washington county, in the District of Columbia.

“ Honorable Sir, — I beg leave hereby to make known to you that I am the son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, and am above the age of fourteen years, but under twenty-one; and I do choose for my guardian, my uncle, John T. Ritchie, of Georgetown aforesaid; and do hereby make application to you, Sir, and request that you will be pleased to appoint him my guardian; that thereby he may possess and exercise the right of protection to myself and the property that has descended to me. With great respect, I remain your most obedient servant,

JOHN W. OTT.”

On the back of which letter was the following affidavit.

“ Maryland, Frederick County, ss.

“ On the 14th day of July, 1825, personally appears John W. Ott, son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, the individual whose signature is attached to the within letter, before the subscriber, a justice of the peace in and for said county; and the said John W. Ott, being by me privately examined apart from and out of the hearing of all persons whomsoever, declares that he had written the within letter for the purpose of having it delivered to the Honorable Judge Lee as thereby directed, with the view to procure the appointment of his uncle, John T. Ritchie, to be his guardian, and that he has not been induced to choose his said uncle to become his guardian by threat or ill usage of his said uncle, or of any other person, or through his or their displeasure. Witness my hand,

“ GEORGE ROHR.”

It is noted on the record of the Orphans’ Court, that the court delivered an elaborate written opinion, concluding with a decree that the petition of Forrest and Mauro be dismissed with costs.

It appears from that opinion, the substance of which was pub-

lished in the National Intelligencer of the 25th of December, 1826, that although the counsel of Mr. Ritchie objected to the court's opening the case upon this bill of review, yet the court did open it; and did reconsider and confirm its former decree; and the question whether that court had power thus to review its decree is to be considered as reserved for the appellate court.

The appeal from the original decree appointing Mr. Ritchie guardian, was dismissed by this Court at May term, 1826, because the transcript of the record was not transmitted within thirty days after the decree.

It is now contended by the counsel of Mr. Ritchie that the present appeal is to the refusal of the Orphans' Court to review its former decree, and not to the decree which in effect affirmed its former decree; so that the only question now before this Court, as they contend, is, whether the Orphans' Court erred in refusing to reconsider its former decree.

But the elaborate opinion of that court shows that it did review its former decree, and that it was because it found that decree to be correct that it passed the decree for dismissing the petition of Forrest and Mauro. The former decree was reviewed, and in fact affirmed.

Does the appeal from this last decree bring before this Court the question whether the former decree was correct? If it does, and if this Court should be of opinion that the first decree was erroneous, and that the Orphans' Court, upon the review or rehearing, ought to have reversed that decree, is it competent for this Court to reverse it? If the Orphans' Court, in its discretion, had a right to review or rehear the cause, and did review or rehear it, we suppose no one will doubt the right of either party to appeal from the new decree made at the rehearing.

The first question, then, is, whether the Orphan's Court had a right, circumstanced as the cause then was, to grant a rehearing, or to review its decree.

It is said that the proceedings of the Orphan's Court are analogous to those of a court of chancery, and that by the rules of that court a cause cannot be reheard after the decree has been enrolled; and that it is considered as enrolled after the expiration of the term in which the decree was rendered.

To this it is answered, that the Orphans' Court has no terms. It sits every day, or whenever the judge thinks proper. That its decrees are never, in fact, enrolled, and are only to be found in the paper minutes of the court. That the court is not bound by the rules of the chancery court; and if it were, yet in courts of chancery a rehearing is often had after the term in which the decree is pronounced, and is always within the discretion of the

court, who will, and often have set aside the enrolment for the purpose of letting in a party to a rehearing. 1 Har. Ch. Pr. 649; and to this effect were cited the case of *Travis v. Waters*, 1 Johns. Ch. Rep. 48; and *Consequa v. Fanning*, 3 Johns. Ch. Rep. 364. See also the case of *Mills v. Banks*, 3 P. Williams, 1, 8, where a cause was reheard after a lapse of eighteen years, and where the chancellor says that a rehearing is in the discretion of the court, and is not always a matter of right; and in one case, where the decree was not enrolled, the court refused to discharge an order for a rehearing, although at the distance of about twenty-four years.

The principal difference between a rehearing and a review, is in this, that a rehearing may be had before enrolment of the decree; but after enrolment the party is put to his bill of review, which, if it be founded upon new matter of fact, discovered since the closing of the commission to examine witnesses, cannot be filed without leave granted upon petition; but if it be founded upon error in matter of law apparent upon the record, no such previous permission of the court is necessary. In the latter case, "the constant method is to put in a plea, and demur, namely, a plea of the decree, and a demurrer against opening the enrolment; and an answer is rarely required, unless the same be ordered by the court; so that in effect a bill of review cannot be brought without leave of the court, in some shape; for if it be founded upon matter apparent in the body of the decree, then, upon the plea and demurrer, the court judge whether there are any grounds for opening the enrolment; and if upon matter of fact newly discovered, the court, upon the petition for leave to file the bill, will judge whether there be any foundation for such leave. 1 Har. Ch. Pr. 170.

The court, then, had a right to review its decree.

In the present case, leave was granted "to file a petition, praying the court to review its order, in granting to John T. Ritchie the guardianship of John W. Ott."

This petition was analogous to a bill of review in chancery, and points out the errors in law apparent upon the record for which it alleges that the decree ought to be reversed. It admits that the decree had been signed and enrolled, and prays that it may be reviewed and reversed.

To this bill, or petition, the defendant, Mr. Ritchie, was cited to answer; and, having appeared, filed a general demurrer; to which there was a general replication and joinder.

The decree of the Orphans' Court thereupon was, that the prayer of the petition cannot be granted, and that the petition be dismissed, with costs.

This decree must be referred to the demurrer, and considered as a judgment in favor of the defendant, upon the issue of law joined by the parties; and cannot be considered as the mere exercise of the discretion of the court in refusing to review its decree, or to rehear the cause. That discretion was exercised, and perhaps expended in the order for leave to file the bill of review. The decree is, in effect, a judgment that the errors, suggested in the bill of review as apparent on the record, were not such as ought to have induced the Orphans' Court to reverse its decree appointing Mr. Ritchie guardian to John W. Ott. The parties had, by the demurrer and joinder, submitted to the court a matter of law, (of right,) not of discretion. The court decided the matter of right, and the parties, aggrieved by the decree, have appealed to this Court.

The question, then, upon this appeal, is, whether that matter of law, (or right,) thus put in issue by the parties, has been correctly decided by the Orphans' Court.

The bill of review states five grounds of error:—

1. That the petitioners, Forrest and Mauro, had, by a previous order of the court, been appointed guardians of John W. Ott, by virtue of the first section of the twelfth chapter of the Act of 1798, c. 101, and that it was not competent for the court to remove them, except for cause shown, in the omission or neglect of some duty; nor without being cited and heard.

2. That the orphan, having had a guardian appointed for him until the age of 21, had no right, at the age of 14, to choose a guardian.

3. That he was not brought into court to choose his guardian.

4. That the petitioners were not cited to show cause why they should not be removed; and

5. That they had no notice of the application and appointment of Mr. Ritchie, until after he was appointed.

1. By the 1st section of the 12th chapter of the Act of 1798, c. 101, it is enacted, "that whenever land shall descend, or be devised to a male under the age of 21 years, or to a female under 16," "and the said male or female shall not have a natural guardian, or guardian appointed by last will, agreeably to the statute in that case made and provided," (12 Car. 2, c. 24,) "the Orphans' Court shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of sixteen, if a female, or marriage."

Under this clause of the statute, the petitioners Forrest and Mauro were, in 1821, appointed joint guardians of the infant children of Dr. Ott.

As the court had power to appoint them guardians until the full age of the infants, and as they were appointed generally, without limitation of time, their authority continues until the infants respectively attain that age, unless it be lawfully revoked by the court.

The Orphans' Court has no express power, under the statute, to remove a guardian, or to revoke the appointment, except in the single case of his refusing to give security when required; and by the 20th section of the 15th chapter of the Act of 1798, c. 101, it is enacted, "That the Orphans' Court shall not, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by that act, or some other law." If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute.

The Orphans' Court, therefore, had no power to remove the guardians, or to revoke their authority, they never having refused to give the security required.

2. But it has been contended that an infant has a common-law privilege of choosing a guardian at the age of fourteen, and that this privilege has been "sanctioned by the uniform usage, in England and this country, of a thousand years;" that it is "a solemn, immemorial right;" and that the statute, when it authorized the court to appoint a guardian until the infant should attain the age of twenty-one years, meant to say, "unless the orphan, after he shall arrive to the age of fourteen years, shall object to such appointment, and ask permission to choose another guardian."¹

But it was not contended that this was an absolute right to choose a guardian;—but a right to be exercised under the "surveillance" of the court; for it was admitted that the court would not appoint the person nominated by the orphan if he "were *non compos*, convicted of an infamous crime, or notoriously dissolute and immoral; nor unless he gave ample security for the faithful discharge of his trust."

The statute does not in the slightest manner recognize, or allude to, the right of the infant to choose his guardian; but by giving the Court an absolute power to appoint a guardian till twenty-one, evidently negatives the idea of any such right; for such a right is inconsistent with the power given to the court.

But it seems to have been taken for granted that, by the com-

¹ See the Judge's opinion in the *National Intelligencer* of the 25th December, 1826.

mon law, the infant had a right to choose his guardian in all cases. This is not true.

When there was a guardian in chivalry, or by nature, or by statute, the infant had no right to choose. It was only when there was a guardian in socage, or for nurture, in which cases the guardianship continued only till the age of 14, that the infant's right of election existed.

By the law of England there are various kinds of guardians.

1, Guardian in chivalry; 2, in socage; 3, by nature; 4, for nurture: (these four were by the common law); 5, by the statute of 4 and 5 Phil. & Mary, c. 8, and 12 Car. 2, c. 24, § 8, by which statutes the father has a right, by deed or last will, to dispose of the custody of his infant children until their age of 21, or for a less time, and these are called "testamentary," and sometimes "statutory" guardians; 6, Guardians by the custom of particular manors, cities, &c.; 7, Guardians appointed by the Lord Chancellor, exercising, in this respect, the royal prerogative of *parens patriæ*; 8, Guardians appointed by the ecclesiastical courts; 9, Guardians *ad litem*, appointed by any court in which the interests of an infant are litigated. 3 Bl. Com. 426; Harg. Co. Lit. 88 b, note 16. These are, in general, only appointed *pro hac vice*, and continue only until such interest is finally disposed of by the Court. 10, Guardians by election.

1. Guardian in chivalry existed only when the infant inherited lands holden by knight's service. This guardian had the custody of the person and lands of the infant until his full age of twenty-one, and took the profits to his own use without account; and also the value of the marriage of his ward. The infant had no right to elect a guardian. This tenure was abolished by the statute 12 Car. 2, c. 24, and with the tenure went the right of guardianship connected with that tenure.

2. Guardianship in socage arose, like that in chivalry, wholly out of tenure. It was necessary that the ward should have inherited lands holden in socage. It continued only until the heir attained the age of fourteen, although some have said that it continued until the age of twenty-one, unless the ward, after his age of fourteen, should have elected another guardian. *The King v. Pierson et al.* Andrews's Rep. 313; Lit. § 123; *Byrne v. Van Hoesen*, 5 Johns. 67. The guardian in socage had the custody of the person and of the lands; but wholly for the benefit of the ward. The guardian in socage must be the next of kin, to whom the lands of the infant cannot by any possibility descend.

3. Guardianship by nature, existed only where the ward was heir apparent of the guardian, and extended only to the person

of the ward. The father was always guardian by nature of the person of his heir apparent, even when the infant inherited lands holden by knight's service, and where the lord was guardian of the estate. Guardianship by nature continued until the full age of twenty-one; and the infant had no right to elect a guardian. This guardianship did not extend to the younger children who were not heirs apparent. Guardian by nature has no right to the custody of the infant's estate. H. St. G. Tucker's notes on 1 Bl. Com. 461.

4. Guardianship for nurture extended only to the custody of the persons of those infants who are not heirs apparent, and continued only until their age of fourteen years, and none could have it but the father or mother. It only occurs where the infant is without any other guardian. After fourteen the infant is at liberty to choose his guardian. How this election is to be made, at common law, does not appear in any book that we have consulted.

The Court of Chancery, exercising, in regard to infants, the prerogative of the King as *parens patriæ*, will appoint guardians whenever such appointment is necessary for the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or of consenting to the marriage of the infant. *Ex parte Woolscombe*, 1 Mad. R. 213. But it could never have been required, by the common law, that all the infants in the kingdom who had not guardians provided by the common law, should be brought into the Court of Chancery, to obtain them.

The ecclesiastical courts have claimed a right to appoint curators or guardians, as to legacies, and distributive shares of the personal estates of intestates, and this right has been admitted by the common-law courts; but their right to meddle with the persons of infants has been denied both by chancellors and by common-law judges. 4 Burn's Eccles. Law, 88, 91; *Banes v. Lowder*, 3 Keb. 834; *Bishop of Carlisle v. Wells*, 3 Jones, 90; S. C. 2 Lev. 162; *Buck v. Draper*, 3 Atk. 631; *Rex v. Delaval*, 3 Burr. 1436. There is a dictum of Lord Chancellor Hardwicke in 2 Vez. 375, that "supposing there was no testamentary guardian, nor a mother, if the infant has any socage land, and is of the age of twelve, if female, or of fourteen, if male, they are allowed to choose their guardian; as is frequently done on the circuit, and is the constant practice, and what this court frequently calls on infants to do; though this is still liable to any reasonable objection made to such choice."

Mr. Hargrave, in note 16 to Co. Lit. 88 b, understands the expression "on circuit" to mean before a judge on the circuit. We have not found this practice alluded to in any other book,

unless it be in Style, 456; but it is so explicitly stated by Lord Hardwicke that we must take it to be so; and it is probable that the appearance of the infant, and his choice, with the approbation of the court, were entered upon the minutes of the court, and constituted the only evidence of the title of the guardian thus chosen. This practice is, by Lord Hardwicke, confined to the case where the infant has socage land; and probably to the case where there had been a guardian in socage, which could only be where the infant took by descent. A person cannot strictly be said to have land unless he has a freehold estate; for none but a freeholder can be tenant to the *precipe*, or be the owner of real estate. Where an infant had land by purchase, and not by descent; or where he had only personal property, it does not appear that a guardian could be elected or appointed before a judge on the circuit.

The right of the ecclesiastical courts to appoint a curator or guardian for the personal estate, is probably no more than the right of every court to appoint a guardian *ad litem*, 3 Salk. 177, pl. 14; 3 Burr. 1436, for those courts, having jurisdiction as to wills and legacies, and the ordering of distribution of intestate estates, all legatees, and persons entitled to distributive portions of intestate estates, were parties before them; and if any of those parties were infants, those courts, as every other court, would have had a right to appoint guardians *ad litem* to protect their interests, so long as they were pending before those courts, and to receive and apply the money or other property which they should receive under the orders of such courts, who would have a right also to take security from such guardians for the faithful execution of their trust. This is probably the only foundation of the power of the ecclesiastical courts to appoint guardians; and it will not support a claim to appoint a guardian for the person of the infant, (*Lowry v. Reynes*, 2 Lev. 217,) or for his personal estate acquired in any other way than by bequest, or in the course of distribution. In the case of guardian for nurture it does not appear in what manner, or before whom the infant, when he attained the age of fourteen, was to make his election; it is probable, however, that it was to be made as in the case of tenure by socage. Nor does it appear that an infant, by the law of England, had a right to choose a guardian in any case where a guardian had been appointed for him by any person having a discretion to choose, unless such appointment were expressly limited to the time of the infant's attaining the age of fourteen, which it is believed, in analogy to the rule of the common law in guardianship in socage and for nurture, was generally the case in appointments by the Court of Chancery, and by the ecclesiastical courts;

after which age of fourteen they were generally permitted to nominate their guardians, and if the courts perceived no material objection, they appointed the guardians thus nominated. Andr. 313, 2 Lev. 217.

After the statute of 12 Car. 2, c. 24, which abolished tenures by knight's-service, almost all the tenures became tenures in socage, and, consequently, almost all guardianships as to lands, fell upon persons not personally chosen by anybody. It was right that these accidental guardianships should be removable at the age of discretion of the infant; but the same reason did not apply to guardians selected by any authority competent to choose persons well qualified to take care of the interest of the infant. Hence the statute of 12 Car. 2, c. 24, § 8, authorized the father to appoint a guardian to his child until the age of twenty-one, without recognizing any right in the child to choose a guardian. This provision, Mr. Justice Blackstone seems to think, was made in consideration of the imbecility of judgment in children of the age of fourteen.

Of the four kinds of guardianship at common law, it is believed that only one exists in this country, namely, guardianship by nature. Tenancy by knight's-service, and, consequently, guardianship in chivalry, never existed here, as the lands were, by charter, to be holden in free and common socage. Guardianship in socage cannot, since the Maryland Statute of Descents, 1786, c. 45, exist here, because there cannot be found any of kin to the infant, who may not, by possibility, inherit the land. Guardianship for nurture cannot exist here, because it is applicable only to such children as are not heirs apparent; and here all are, by that statute, heirs apparent, and, consequently, guardianship by nature exists in this country, and applies to all the children.

But a guardian by nature, at the common law, has no authority over the lands of the infant, and, perhaps, not over his personal estate; as it has been decided, both in England and in some of these states, that he has no right to receive a legacy bequeathed to his ward. See Harg. Co. Lit. 88 b, and note 12; *Genet v. Tallmadge*, 1 Johns. Ch. Rep. 3; *Anderson v. Derby*, 1 Nott & McCord, 369; *May v. Calder*, 2 Mass. 59; *Strickland v. Hudson et al.* 3 Chan. Rep. 168; *Dagley v. Tolferry*, 1 P. Wms. 285; Eq. Cas. Ab. 300, pl. 2; Gilb. Eq. Cas. 103; *Phillips v. Pagel*, 2 Atk. 80; *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Cunningham v. Harris*, cited by the Master of the Rolls, in *Cooper v. Thornton*; Tucker's notes to 1 Bl. Com. 462; 1 Vern. 295; 1 Johns. Cas. 217.

5. Statutory guardianship. The statute of 4 & 5 Phil. &

Mary, c. 8, which, by implication, gave the father a right to appoint a guardian, by deed or will, to his daughters until the age of sixteen, and upon the death of the father, without such appointment, gave the custody of the daughters to the mother; and the statute of 12 Car. 2, c. 24, § 8, which authorized the father to appoint, by deed or will, a guardian for his infant children until their full age, were in force in Maryland; and the latter is expressly recognized and referred to in the testamentary system of Maryland of 1798, chaps. 12, 101, § 1. These statutes are now in force in this county, and such guardians may now be appointed by the father.

6. Guardians by custom are unknown in this country.

7. Guardians by appointment of the chancellor. The chancellor in Maryland, it is believed, never had the power of appointing guardians, except *ad litem*.

8. Guardians by appointment of the ecclesiastical courts. No such courts exist in this country.

The judge, or commissary-general, or deputy-commissaries, who exercised in Maryland the only remnant of ecclesiastical jurisdiction transferred to this country, had no such power. It was, by the Maryland Act of 1715, c. 39, vested solely in the commissioners of the county courts, that is, the justices of the county courts.

9. Guardianship *ad litem*. All the courts had power to appoint guardians *ad litem*, to protect the interests of infants in their respective courts.

10. Guardianship by election, as mentioned by some of the English writers, has never been recognized in this county. Hargrave, in his note 16 to Co. Lit. 88 b, says:—"The right of making such an election arises only when, from a defect of the law, the infant finds himself wholly unprovided with a guardian."

Lord Coke, in Co. Lit. 87 b, says:—"If a man be seized of a rent-charge, rent-seck, common of pasture, and such like inheritances which do not lie in tenure, and dieth,—his heir within the age of fourteen years,—in this case the heir may choose his guardian; but if he be of such tender years as he can make no choice, then (if the father hath made no disposition of the custody of the child,) it were most fit that the next of kin, to whom the inheritance cannot descend, should have the custody of him. And whosoever taketh the rent, &c., the heir shall charge him in an account. But if he hold any land in socage, in that case the guardian in socage shall take into his custody as well the rent-charge, &c., as the land holden in socage, because he hath the custody of the heir." This is a case in which Lord Coke sup-

poses that the heir may choose his guardian before the age of fourteen.

Mr. Hargrave remarks upon it, that "Lord Coke only takes notice of such an election where the infant is under fourteen; and, as to this, omits to state how, and before whom, it should be made. Nor have we yet met with any prior or cotemporary writer who supplies the defect. As to a guardian after fourteen, it appears, from the ending of guardianship in socage at that age, as if the common law deemed a guardian afterwards unnecessary. However, since the 12 Car. 2, enabling a father to appoint a guardian to his children till twenty-one, it has been usual, for want of such a guardian, to allow the infant to elect one for himself." "Such election is said to be frequently made before a judge on the circuit. 2 Ves. 375. But we do not think this form to be essential. The last Lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes, relative to his proprietary government of Maryland, named a guardian by deed." "Indeed, it seems as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and therefore election by parol might, perhaps, be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency, because guardianship by election of the infant is of very late origin; it being, we believe, not only unnoticed by any writer before Lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether an infant may change a guardian so constituted by himself. Even Lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned the latter one, omits it here." Co. Lit. 88 b. "Whence it may probably be conjectured that, in his time, it was, in strictness, scarcely recognized as legal."

What Swinburne says in Part 3, § 11, respecting the right of the infant to choose his tutor, applies only to the custom of the province of York. *Buck v. Draper*, 3 Atk. 361. Thus we see that the right of infants, at the age of fourteen, to choose their guardians, is not universal, nor has been "of a thousand years' standing."

By the law of Maryland, 1715, c. 39, § 7, "If any part thereof," that is, of the intestate's estate, "belong to an orphan who is capable of choosing his guardian, such orphan shall be called to court," (the county court,) "and shall then and there choose his guardian, into whose hands the said orphan's estate shall be committed; but if such orphan be not at age, then the justices

aforesaid" (of the county court,) "shall put the persons, lands, goods, and chattels of the orphans into the hands of such person or persons as they shall think fit, and take a bond, with two sufficient sureties, in the names of the orphans themselves, for the securing and delivering the said estate to said orphans, or their guardians, when thereunto lawfully called."

The persons thus appointed, before the orphan is of age to choose his guardian, are, by the act, called trustees. It is not expressly said in the act how long these trustees shall exercise the rights of guardianship; but, from their being bound to deliver up the property to the orphans themselves, it is evident that the guardianship was to continue, or might continue, until the orphans should be of full age, and capable of receiving the possession of their estates; and by the provision being in the alternative, namely, to deliver up the estates to the orphans, or to their guardians, it is equally evident that guardians might be afterwards appointed; but as the county court had power, upon the trustees' refusal to give new security when required, "to remove the orphan's estates out of their hands," 1715, c. 39, § 20, "and to remove the person and estate of such orphan into other hands," 1729, c. 24, § 6, it does not necessarily follow that the trustees so appointed were to be removed of course, upon the infant's attaining the age of fourteen; nor that the infant, after such appointment, had a right, at the age of fourteen, to choose his guardian; for the obligation of the trustees to deliver up the estate to the guardian, when required, might be only an obligation to deliver it to the person into whose hands the court should order it to be removed, in the cases referred to in the 20th section of the Act of 1715, c. 39, and 6th section of the Act of 1729, c. 24.

This idea is corroborated by the 33d section of 1715, c. 39, by which, if a guardian should commit waste, and should fail to give security as the court should require, to answer to the orphan for the waste, when at age, the orphan (if at age to choose his guardian,) should elect his guardian; but if not of age to make such election, the court should appoint such other person as they should think meet; and the guardian so elected, and the other person so appointed, were to hold and enjoy the land and plantations until the orphan should "come to age." By this section, the persons appointed by the court while the orphan was under fourteen years of age, were required to hold the estate granted, until the full age of the infant; therefore, taking together the 7th, 20th, and 33d sections of the Act of 1715, with the 6th section of the Act of 1729, and the Act of 1763, c. 24, it seems to us that the right of the infant to elect a

guardian, which is clearly recognized by those acts, is confined to the case where the infant is without a guardian or trustee already appointed by the court, or by the father, under the statutes of the 4 and 5 Phil. & Mary, c. 8, or the 12 Car. 2, c. 24.

By the Act of 1763, c. 24, the court was authorized, on application, to permit an orphan of fourteen years of age to choose his guardian; and if under fourteen, the court was to appoint the guardian, even before the distributive share of the orphan was certified by the commissary to the county court; and the guardian so appointed was to have the same power as a guardian otherwise appointed, — viz. to hold the estate until the full age of the orphan.

The Act of Maryland of 1777, c. 8, by which the Orphans' Court was erected, gives to that court all the powers before vested in the county courts, or in the commissary general, in relation to guardians and testamentary affairs.

Thus the law stood until the legislature revised the several acts upon the subject, and adopted the system reported by the chancellor of Maryland in 1798, c. 101.

In the previous acts nothing was said of guardians by nature, or natural guardians, or testamentary guardians, except that the latter are excluded from the operation of the 30th § of the Act of 1715, which requires the guardian to ascertain the annual value of the real estate, &c. the words are "other" (orphans) "than such whom the testator in his lifetime, by his last will or testament, hath otherwise ordered and disposed of." But those acts only provided for the case of orphan infants; that is, fatherless infants. The legislature seems to have supposed that the father, as guardian by nature, had the custody and care of the real and personal estate, as well as of the person of his child; and does not seem to have considered the mother of an orphan as his guardian by nature, after the death of the father.

This was not so at the common-law. By that law the guardian by nature, had only the custody of the person of his heir apparent; and, after the death of the father, the mother, if living, was guardian by nature to her heir apparent. The grandfather was also guardian by nature to his grandson, if he was his heir apparent. So the grandmother, the uncle, the aunt, &c. would, each, be guardian by nature to his or her heir apparent; and yet the old acts of Maryland, in all such cases, authorized the county courts to appoint guardians, although there were already, by the common law, guardians by nature whose authority over the person of the infant, continued until he arrived at the age of twenty-one years.

Those acts, and especially the Act of 1715, having provided for a guardian in every case, except the case of an infant whose father was living, ought to be construed as having virtually declared that the father, as guardian by nature, should have the custody and care of the real and personal estate of the infant, as well as of his person. But the acts did not give the courts authority to require surety from the father, as natural guardian, unless that authority were given by the 20th section of the Act of 1715, which enacts, "That the justices of the county courts take able and sufficient security for orphans' estates, and inquire yearly of the security; and if there be just cause, that they require new and better security; and upon refusal to give new and better security, that they remove the orphans' estates out of their hands." This section was not deemed sufficiently explicit to enable the county court to demand security from guardians, chosen by infants of fourteen years; and to remedy this defect, an act was passed in 1752, c. 3, expressly for the purpose of enabling the court to require security from such guardians; but that act did not apply to guardians by nature. If the 20th section of the Act of 1715, did not, by its general terms, include guardians chosen by infants, it could not include natural guardians nor testamentary guardians. Indeed, if testamentary guardians had not been expressly recognized in the 30th section of the Act of 1715, it would be difficult to maintain that the general words, in which the 7th section gives the power of appointment to the county court, would not be justly construed as repealing the statutes of 4 & 5 Phil. & Mary, c. 8, and 12 Car. 2, c. 24, so far as they might have been supposed to operate in Maryland. But it is believed that those statutes have always been considered as in force in Maryland, so far as to authorize a father to appoint, by his will, a guardian for his infant children.

Again, the 7th section of the Act of 1715, c. 39, by giving power to the court to appoint a guardian for every orphan who is entitled to a distributive share, superseded, in all such cases, the common-law right of guardianship by nature, except in the case of the father; so that neither the mother, nor the grandfather, nor the uncle, could, in such cases, be guardians by nature, in Maryland. From whence it follows, that after the Statute of Descents, 1786, c. 45, and before 1798, in Maryland, there were only three kinds of guardians, viz.:

1. Testamentary guardians under the statute of 4 & 5 Phil. and Mary, c. 8, and 12 Car. 2, c. 24.
2. Natural guardians.
3. Statutory guardian; viz. guardian appointed by the county

court under the Statute of 1715, and by the Orphans' Court under the Statute of 1777, c. 8.

For although the orphan, at the age of fourteen, had a right to choose a guardian, the appointment was still to be made by the court; and although the persons appointed by the court, when the orphan was under the age of fourteen, were called trustees, yet they were, in fact, guardians, and had all the rights, and were subject to all the duties of guardians; they are, indeed, sometimes called guardians in the same Act of 1715.

The infant, if no guardian had been appointed for him, and if his father were not alive, when he arrived at the age of fourteen, had a right to choose his guardian in court; but if a testamentary guardian had been appointed, or if the court had appointed a guardian for him before his age of fourteen, or if his father were living, he had no right to choose his guardian.

If this be the true construction of the law of Maryland previous to 1798, the provisions of the act of that year, c. 101, will be perfectly intelligible.

The Act of 1798, c. 101, ch. 12, does not, like the Act of 1715, confine the power of the court to the case of orphans entitled to a distributive share of an intestate personal estate, but extends it to all infants to whom lands shall descend, or be devised, or who may be entitled to a legacy, or to a distributive share of the personal estate of an intestate, if the infant have no natural or testamentary guardian.

By "natural guardian," in this statute, must be intended such a natural guardian as is entitled to the guardianship of the estate, as well as of the person of the infant. At common law, there was no such natural guardian; the guardian by nature, under that law, being only entitled to the custody of the person of his heir apparent. The previous law of Maryland, recognized only one natural guardian entitled to the guardianship of the estate of the infant; and that was the father.

If, then, the infant have no father, nor testamentary guardian, the Orphans' Court has the right of appointing the guardian. The Act of 1798, does not, in any manner, recognize the right of the infant to choose his guardian at any age. On the contrary, the Orphans' Court is authorized, in all cases in which it may appoint a guardian, to make the appointment until the full age of the infant. This power is directly repugnant to those parts of the former acts of Maryland, which authorize the infant to choose his guardian, and consequently repeals them. Guardianship in socage, and guardianship for nurture, which were the only two cases in which the infant had, by the common law, a right to choose his guardian, seem to have been virtually abo-

lished by the Act of 1765, c. 39, which gave the power to the county courts to appoint guardians to all orphans entitled to a distributive share. The right of election, which they afterwards had, depended upon the statutes which were repealed by that of 1798, c. 101.

The case of an orphan who has acquired property by deed of gift, or by purchase other than devise, is not provided for by that statute. There is no court competent to appoint a guardian for him, nor do we think he can constitute one by his own act. Indeed, we think he has not, in any case, a right to choose his guardian.

And it was not without reason, that the legislature thought proper to transfer the right of election from the infant to the Orphans' Court. At the age of fourteen, the infant begins to be restless and ungovernable, and the salutary restraints of the guardian are irksome. The infant is apt to think his guardian penurious and tyrannical. He wants greater indulgences; and there are always artful and insinuating men enough, who are eager to grasp all the property they can lay hold of; and who, taking advantage of these dispositions in the infant, will stimulate his restlessness, excite his suspicions, undermine the authority of the guardian, and finally prevail on the infant, in his simplicity, to place his property in their hands. The chance of evil resulting from the infant's right of election, seems greater than the chance of good; and the choice of the court is more likely to be judicious than that of the infant.

The 3d error assigned, is that the infant was not brought into court to choose his guardian.

This appears to us also to be a fatal error; especially as the infant was not out of the jurisdiction of the court at the time.

In the case of *Lloyd v. Carew*, in 1699, 1 Eq. Ca. Ab. 260, pl. 2, it is said, that "if a person, appointed a guardian pursuant to the Statute 12 Car. 2, c. 24, dies, or refuses to take upon himself the guardianship, my Lord Chancellor may appoint a guardian; but a guardian cannot otherwise be appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him." 2 Fonb. B. 2, part 2, ch. 2, § 2, p. 236.

In an anonymous case, in the Upper Bench, in 1655, "The court was moved in behalf of an infant to discharge a guardian assigned by the court, with an intent to make Richard Somers, attorney of this court, guardian in his room, and that the former inspection may be discharged, and that the infant may now be inspected again, because when the former inspection was, and the guardian assigned, there was no action depending in court against the infant. GLYN, C. J. Let it be so, for the cause

you have alleged, and give notice of it to the former guardian." Style, 456.

1 Newland's Ch. Pr. 105. If the infant reside within twenty miles of London, the guardian is appointed by the court, for which purpose the infant, and the person intended to be appointed guardian, personally attend in court. If the infant reside above twenty miles from London, the guardian is appointed by commission, and the infant must be personally before the commissioners. 14 Ves. 172. 2 Newland's Ch. Pr. 151. 1 Har. Ch. Pr. 711, 712. 2 Mad. Ch. Pr. 279.

The Maryland Act of 1715, c. 39, § 7, which allowed an infant of the age of fourteen to choose his guardian, required the infant to be called to court, and then and there to choose his guardian; and the Act of 1798, c. 101, ch. 12, § 2, says, "the said court shall have power to call, or have brought before them, any orphan as aforesaid, for the purpose of appointing a guardian."

If, as we have supposed, the only right which the infant had, in Maryland, to choose his guardian, be given by the statute, it must be exercised in the manner prescribed by the statute.

We think, therefore, that if the infant had a right to choose his guardian, it could only be done personally, and in open court, and not having been so done, the election and appointment were void.

The 4th error assigned is, that the petitioners were not cited to show cause why they should not be removed.

That the petitioners, who were the actual guardians, and who had a right to continue such until the full age of their ward, unless lawfully removed, should have had notice of his application, and an opportunity to show cause against it, seems to have been a course dictated by a common sense of justice. They had a power coupled with an interest, which they had a right, and perhaps, were bound to defend. But, as we think the orphan had no right to elect a guardian, and if he had, he could not exercise it out of court, we think the want of notice is a fatal error.

The 5th error assigned is in substance only a repetition of the 4th.

Upon the whole, we are of opinion, that the Orphans' Court, having appointed Mr. Forrest and Mr. Mauro guardians of the infants until his age of twenty-one years, had no jurisdiction or authority to appoint Mr. Ritchie, and that his appointment is not merely voidable, but absolutely void; that Mr. Forrest and Mr. Mauro have never ceased to be guardians; and are now entitled to all the rights and powers of guardians; and that the sentence of the Orphans' Court, dismissing the bill of review, be reversed,

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with costs ; and that this Court, proceeding to pass such sentence, as the Orphans' Court ought to have passed upon the hearing of the bill of review, should order and decree that the order of the Orphans' Court, appointing John T. Ritchie guardian to the infant John W. Ott be reversed, with costs.

Morsell, J., concurred.

Thruston, J., did not dissent.

An appeal to the Supreme Court of the U. S. was dismissed for want of jurisdiction, the matter in dispute not being of the value of \$1000. 2 Peters, 243.

McDANIEL v. RIGGS.

Judgment was rendered in Virginia, in favor of Shepherd, for the use of Riggs against Dixon, and McDaniel, his bail. McDaniel paid the money to Riggs, upon the execution, and took an assignment of the execution against Dixon. The execution against McDaniel, the bail, was quashed by the court in Virginia ; and he brought suit in this Court against Riggs for money had and received, to get back his money. Held, that he was entitled to recover, although he still held the assigned execution against Dixon.

THIS was submitted to the Court, upon the following case agreed.

In 1818, in the Superior Court of Loudoun county, in Virginia, one Shepherd, for the use of Riggs, brought an action of debt against Jacob Dixon, for whom, McDaniel, the present plaintiff, became appearance-bail. At November Rules, 1818, there was an office-judgment against Dixon and McDaniel, his appearance-bail, *nisi*, which was confirmed at December Rules, 1818. On the 6th of April, 1819, McDaniel came into Court, and entered himself special bail for Dixon. On the 10th of the same April, 1819, judgment was again rendered by default against Dixon, and McDaniel, his "common bail." On the 9th of April, 1823, upon an execution issued on the 16th of April, 1819, agreeably to an office judgment rendered on the day of April, 1819, upon motion of McDaniel, it appearing to the Court that special bail was entered on the 6th of April, 1819, the execution was quashed as to him, McDaniel. On the 6th of April, 1824, upon an execution issued on the 16th of April, 1819, agreeably to an office-judgment entered at the rules on the 10th of April, 1819, on the motion of McDaniel, and it appearing that special bail was entered on the 6th of April, 1819, it was ordered that the judgment as to McDaniel be set aside, and that

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execution as to him, be quashed; and a writ of restitution was awarded to the said McDaniel, he having before paid the money on the execution, to Riggs, upon receiving an assignment of the execution against Dixon; which execution was returned by the sheriff, at the return term, (August, 1819,) with the indorsement of the assignment thereon; but without any other return written thereon. Riggs was never a resident in Virginia; and a writ of restitution could never have been served upon him, if such could have issued, or had issued against him. It did not appear, by the record, whether the writ of restitution was awarded against Shepherd, the legal and nominal plaintiff in the action, or against Riggs, for whose use the suit was originally brought, as appeared by the record, and who actually received the money; although this fact, the receipt of the money by Riggs, did not appear in the transcript of the record.

The question submitted to the Court was, whether the plaintiff was entitled to recover, in this action, upon that state of facts.

The COURT (CRANCH, C. J. *contra*) was of opinion, that the plaintiff was entitled to recover.

CRANCH, C. J., thought that as this was an action for money had and received, which is an equitable action, the plaintiff must show that *ex æquo et bono*, he was entitled to get back the money; but as he had received an assignment of the judgment at the time of paying the money to Riggs, (which was a valuable consideration,) and still held that assignment, Riggs, who had lawfully received the money, had a right to retain it; especially as McDaniel was still bound as special bail.

HEARNE v. BARRY.

If the purchaser of lots at a sale under a decree of this Court, neglects to pay the purchase-money, and suffers them to be sold for taxes, the Court will, upon the petition of the trustee, order so much of the property to be resold, as will pay the taxes and redeem the residue.

ROBERT BARRY had become the purchaser of certain lots in Washington, under a decree of the Court in this cause, but had not paid the purchase-money, and had permitted the lots to be sold for taxes, and to be bought in by his son, for a very small price. The time for redeeming them will expire on the 15th of June next. Griffith Coombe, the trustee appointed by this Court to make the sale, petitioned the Court to order so much of the

Patriotic Bank v. Coote and Jones.

property to be resold, as would be sufficient to redeem the residue under the corporation laws; and obtained a rule to show cause, &c., which was served upon Mr. Barry and his son.

Mr. Worthington and *Mr. Coxe*, for the Barrys, contended that this Court has no power to order a resale. That Robert Barry, junior, (the son) the purchaser at the tax-sale, is not a party to this suit, and his right as a purchaser cannot be affected. How could a purchaser under such a resale, maintain ejectment? This Court has refused to order a purchaser under its decree, to complete his purchase, so as to bring him into contempt.

Mr. Jones, contra. This Court will not assist a forfeiture. The sale will not affect the inchoate right of R. B., jun. The purchaser will take it subject to his right, at the tax-sale. The Court always retains the right of resale if the purchase-money be not paid. The Court will not suffer the real security to be lost, if the loss can be prevented.

Mr. Coxe cited the case of *Oats et al. v. Ladd & Hall*.

The Court ordered a resale of so much as would redeem the residue.

 PATRIOTIC BANK v. COOTE AND JONES.

One of the defendants, if released by the plaintiff, may, if willing, be sworn and examined as a witness for the plaintiff.

The defendants were not permitted to give secondary evidence of the contents of a check, without first showing that the original check was not in their power.

When a witness is produced to testify as to the credibility of another witness, the proper questions, to be put to the witness, are, "Do you know the common reputation of the witness for veracity, among the generality of his acquaintance? From your knowledge of his general reputation for veracity, would you believe him on his oath?"

The witness is not to be asked who were the persons he had heard say that the general reputation of the witness for veracity was not good.

The fact to be ascertained is the common repute as to truth.

If a check upon a bank be drawn in the name of one of a firm only, it cannot be charged to the firm, unless drawn by authority of the firm, although used and applied in the business of the firm, and the promise of one partner, individually, to make good an overdraft, does not bind the firm.

The burden of proof is on the creditor to show that the individual partner had authority to bind the firm by acts in his own name.

ASSUMPSIT, for overdraft by defendants, \$150.

The plaintiffs having released Mr. Coote, one of the defendants, from all actions and demands, except jointly with the other defendant, *Mr. Jones* offered him as a witness.

Mr. Wallach, for the plaintiffs, cited *Consequa v. Willing*, 1 Peters, Rep. 305; *Wise v. Bowen*, in replevin in this Court, in

1821, (2 Cranch, C. C. 239,) where Bowen, the defendant, was examined as a witness; *Gaither v. Farmers & Mechanics Bank of Georgetown*, in this Court, in December, 1824, not reported, where Nicholls, a stockholder in the bank, was examined as a witness.

Mr. Jones, for the defendant Jones, referred to the case of *Warner v. McCloud*, in this Court, at Alexandria, of which case there is no report; *Piles v. Plum & Swann*, (2 Cranch, C. C. 32); and *Johnson v. Chapman*, in this Court, at Alexandria, *Ibid.*; *Nicholson v. Patton*, in Alexandria, *Id.* 164; and *Forrest v. Van Ness & Crossfield*, in Washington, not reported; 1 Phil. on Ev. 60; *Norden v. Williamson*, 1 Taunt. 378; Stark. on Ev. Part 4, 706, 1063, &c.; *Dixon v. Waters*, in this Court, at Washington, December, 1824, (2 Cranch, C. C. 527.)

Mr. Wallach and *Mr. Key*, in reply, cited 1 Phil. on Ev. 63, and *Patton v. Janney*, at Alexandria, (2 Cranch, C. C. 71.)

The COURT (*nem. con.*) permitted Mr. Coote to be sworn, he being willing.

The plaintiffs gave in evidence an account, which had been admitted by Mr. Coote to be correct, and proved that the checks and vouchers of the account had been delivered to the defendant Jones, and having called upon him to produce them in court, at the trial, rested their case upon that evidence.

The defendant's counsel, in cross-examining one of the plaintiffs' witnesses, Mr. Carr, who was an officer in the bank, asked him whether a certain check, constituting one of the items of that account, was drawn by Mr. Coote in the name of the firm.

The plaintiffs' counsel objected that the defendant could not give secondary evidence of the contents of that check, without first showing that the original check was not in his power.

The COURT (MORSELL, J., *contra*,) was of that opinion; and that the plaintiffs' evidence was not to be considered as secondary.

Mr. Shanks was called as a witness to the reputation of Mr. Coote for veracity.

The COURT said that the proper questions to be put to the witness were:—"Do you know the common reputation of Mr. Coote for veracity, among the generality of his acquaintance?" "From your knowledge of his general reputation for veracity, would you believe him upon his oath?" Starkie, Part 2, p. 146, and note 1.

A witness having testified that he had heard several persons of Mr. Coote's acquaintance say that his reputation for veracity was not good, *Mr. Key*, for the plaintiffs, asked him who those

persons were ; but the witness declined answering, unless ordered by the Court.

The COURT (MORSELL, J., *contrà*,) thought he was not bound to answer ; and said that the fact to be ascertained was, the common repute of Mr. Coote, among his acquaintance, as to veracity ; and that if the witness is bound to state the names of those who had impeached the credit of Mr. Coote, it might lead to an almost endless inquiry ; and to the same evils which would result from permitting evidence to be given of particular acts of turpitude, to impeach the character of a witness.

The COURT, (*nem. con.*) at the prayer of the defendant's counsel, instructed the jury, "that if they should find, from the evidence, that the overdraft claimed by the plaintiffs in this cause was produced by charging, in the account of C. T. Coote & Co. in the said bank, a check or checks drawn in the sole and individual name of C. T. Coote, the plaintiffs are not entitled to recover for such overdraft in this action, unless it appears that such checks were drawn upon the credit, and by the authority of the firm ; notwithstanding it may appear to the jury that some of the moneys, credited in the said account to the firm, were originally noted in the rough memorandum-book, called "the scratch," as deposited by C. T. Coote, without naming the firm, and were afterwards carried to the credit of the firm in the said account ; and notwithstanding the jury should believe the evidence offered on the part of the plaintiffs, that the money paid on such checks was used and applied by the said C. T. Coote in the business and concerns of the said firm ; and that, under such circumstances, the promise of the said C. T. Coote, to make good such overdraft, does not bind the said firm of C. T. Coote & Co. That the said checks are *primâ facie* evidence that the same were drawn on the individual account and credit of Coote alone ; and that the burden of proof is on the plaintiffs, to show that he was authorized by the firm to draw the said checks."

And the COURT also (*nem. con.*) instructed the jury, at the prayer of the plaintiffs' counsel, as follows : — "But if the jury should believe, from the evidence, that the said \$300 were drawn by the check of C. T. Coote, by him, from the partnership funds in the Patriotic Bank, with the view of transferring so much of the partnership funds from that bank to the United States Bank, and that he did thereby so transfer the same, and deposit the same, to the credit of the firm, in the said United States Bank, then the defendants are chargeable with the amount of said check."

Verdict for plaintiffs, \$150 and interest.

Wood v. May.

WOOD v. MAY.

In replevin for goods distrained for rent-arrear, if the jury do not render such a verdict as will enable the Court to render the statutory judgment in favor of the defendant, the Court may render the common-law judgment for a return of the property replevied; and in an action upon the replevin bond, for not returning the property, the defendant may, in mitigation of damages, show that no rent was in arrear.

The value of the goods stated in the replevin-bond is *primâ facie* evidence of the plaintiff's damages; and if the defendant should contend for a less amount, the burden of proof is on him to show it.

If the jury, in replevin, do not find the value of the goods distrained, their finding of the amount of rent in arrear is surplusage.

DEBT, on the replevin-bond of Mrs. Arguelles and her sureties.

The defendant, one of the sureties, pleaded three pleas: 1. That the plaintiff in replevin did prosecute her writ with effect; 2. That she did not make a return of the goods replevied; and 3. No such record of a judgment for a return. Upon these pleas issues were joined; and, upon the trial,

Mr. Hall, for the plaintiff, contended that the value of the goods was the measure of the plaintiff's damages upon the issue on the second plea; and that the amount stated in the bond is evidence of the value.

Mr. Jones, for the defendant, *contra*.

The COURT (*nem. con.*) said, that if the jury should find the issues for the plaintiff, the value of the goods stated in the bond is *primâ facie* evidence of the amount of the plaintiff's damages; and that, if the defendant should contend for a less amount, the burden of proof is on him to show it. In the action of replevin of *Arguelles v. Wood*, in which this bond was taken, the defendant avowed for rent-arrear, and upon that issue the jury found for the defendant, and one cent damages, and that the rent arrear was \$140, but did not find the value of the distress, so that the court could not render judgment under the statute 17 Car. 2, c. 7; but the court rendered the common-law judgment, for a return of the property. The present action is upon the replevin-bond given by Mrs. Arguelles in that case.

The Court having given the above opinion, *Mr. Jones* and *Mr. Wallach*, for the defendant, offered to prove that the rent was all paid; to which *Mr. Hall* and *Mr. Key*, for the plaintiff, objected, contending that the verdict rendered in the case of *Arguelles v. Wood* was conclusive evidence that \$140 rent-arrear were due.

But the COURT (*THRUSTON, J., absent.*) was of opinion, that so much of the finding, namely, that \$140 rent were in arrear,

Bank of United States v. McKenney.

was mere surplusage, inasmuch as the jury did not also find the value of the distress, so as to make it a material finding under the statute, and to enable the court to render the statutory judgment; and that it was now competent for the defendant to show in mitigation of damages, that less rent was due; the question upon the issue of no rent-arrear being whether any rent be in arrear, and not whether any particular sum be due. See Starkie on Ev. Part 4, p. 1297.

Verdict for the plaintiff \$140, with interest from 25th July, 1823; and judgment accordingly.

BANK OF UNITED STATES v. DANIEL BUSSARD.

In an action against the maker of a promissory note, it is not necessary to show a demand of payment at the bank in which it is made payable.

ASSUMPSIT against the maker of a promissory note, to the order of William King, for \$10,255, for value received, "negotiable and payable at the Bank of Columbia."

Judgment was confessed, subject to the opinion of the Court, whether the plaintiffs could maintain the action without averring and proving demand of payment at the Bank of Columbia.

Mr. Lear, for the plaintiffs, cited *The Bank of the United States v. Smith*, 11 Wheat. 171.

Mr. C. C. Lee, for the defendant, cited *Beverley v. Beverley*, in this Court, at Alexandria, (2 Cranch, C. C. 470,) not then decided; and *Rowe v. Young*, 2 Brod. & Bing. 165; S. C. in Error, 2 Bligh, 391.

The COURT (CRANCH, C. J., doubting,) decided that it was not necessary for the plaintiffs to aver or prove a demand of payment at the Bank of Columbia, in this action against the maker.

BANK OF UNITED STATES v. WILLIAM MCKENNEY.

Upon a judgment rendered by mistake of the clerk against William McKenney, at the preceding term, the Court refused to order the clerk to issue an execution against Samuel McKenney, although the writ, declaration, and pleadings were all in the name of Samuel, who was the person against whom the judgment ought to have been rendered. But the Court ordered the judgment to be rescinded, the proceedings corrected, and the continuances entered up under the Maryland Act of Assembly.

THE writ and declaration in this case were against Samuel

McKenney, as indorser of William McKenney's note. Samuel was arrested, gave bail, appeared, and pleaded. The clerk, in making out the docket, had named the defendant, William, instead of Samuel; and *Mr. Coxe*, who was counsel for William, the maker, supposing the action was against William, confessed the judgment, which was entered up against William.

Mr. Lear, for the plaintiffs, first moved the Court for leave to take execution against Samuel, considering it as a judgment against Samuel.

But the COURT (*nem. con.*) refused.

Mr. Lear then moved the Court to order the clerk to strike out the judgment against William, correct the docket, and enter up the continuances under the Act of Assembly of Maryland.

Which motion the COURT granted, (*MORSELL J.* absent.)

UNITED STATES, for the use of *Balch et al. v. ROSE.*

An action cannot be maintained upon the administration-bond of an executor, for not giving in a claim against himself, until the claim has been established by the Orphans' Court, according to the Maryland Testamentary Act of 1798, c. 101, § 20, cl. 8.

DEBT on the administration-bond of the defendant who was one of the executors of the will of *Mr. Brook Beall*.

The breach assigned in the replication was, that the defendant was indebted to his testator upon bond, as well as upon open account, and that he had not given in or accounted for either of the said debts.

To this replication there was a general demurrer, and joinder.

By the Maryland Testamentary Act of 1798, c. 101, § 20, cl. 8, it is enacted, "That the bare naming of an executor in a will shall not operate to extinguish any just claim which the deceased had against him; but it shall be the duty of every such executor accepting the trust, to give in such claim in the list of debts; and on his failure to give in such claim, or any part thereof, any person, interested in the administration, may allege the same by petition to the Orphans' Court granting the administration; and the said court, with consent of the parties, may decide on the same; or it may be referred by the parties, with the court's approbation; or, at the instance of either party, the court may direct an issue, or issues to be tried, and the same shall be tried in any court of law proper for the trial, and most convenient under all circumstances; and the court of law shall have power to direct the jury, and grant a new trial, as if the

issue or issues were in a suit therein instituted ; and a certificate from such court, or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the Orphans' Court to establish or destroy the claim, or any part thereof ; and if the executor shall give in such claim, or the same, or any part, be established as aforesaid, he shall account for the sum due in the same manner as if it were so much money in his hands, and, on failure, his bond may be put in suit."

Mr. Marbury, for the defendant, contended that no suit could be maintained upon the administration-bond against the executor, for not giving in a claim against himself, until the claim should have been established by the Orphans' Court, in the manner provided by the Testamentary Act of 1798, c. 101, § 20, cl. 8, above recited. At common law the debt would be extinguished ; the plaintiff's only remedy is given by the statute ; and he must take that or none. *Mr. Marbury* cited the Maryland Act of 1720, c. 24, § 2, and the case of *Segar v. Seney*, 5 Har. & J. 488.

Mr. R. P. Dunlop, and *Mr. Jones*, *contra*, contended, that it was the duty of the executor to give in the claim, whether cited before the Orphans' Court, or not. That the condition of the bond was general, that the executor "shall well and truly perform the office of executor," "according to law, and shall in all respects discharge the duties of him required by law, as executor aforesaid, without any injury or damage to any person interested in the faithful performance of the said office."

The neglect of any duty, is a breach of the condition of the bond, and will support an action.

The proceeding provided by the statute is not necessary ; the condition is broken, and for every breach an action lies at common law, without the aid of any statute. The proceeding under the statute is cumulative only, and does not impair the common-law remedy upon the bond.

The Act of Maryland of 1720, c. 24, § 2, restraining the right to sue upon the administration-bond, until a return of *non est inventus*, or *nulla bona*, applies only to creditors of the estate, and shows that, but for that act, a direct and original suit might have been maintained, on the bond, by any person interested.

This suit is not brought by a creditor of the estate, but by legatees. A creditor has a legal remedy against the executor, but a legatee has not. He cannot comply with the requisition of the statute by obtaining judgment at law, or even by issuing a *capias ad respondendum*. But the Act of 1720 was repealed by the Act of 1798, c. 101, § 10, cl. 3, which gives a right of action upon the bond to "any person conceiving himself interested in the administration of the estate ;" "and judgment may be recovered,

 Blodget v. Thornton.

upon such action, for the damage actually sustained." This is an action for damages actually sustained by the legatees. "Actually" stands opposed to "judicially." "Actually sustained," not "judicially ascertained." The case *Segar v. Seney*, 5 Har. & J. 488, is not law; it is contrary to the practice of this Court; and is not considered by the Court of Appeals of Maryland as of any authority upon the point stated by the reporter. The ground of the decision was that the action ought not to have been brought against Benton's administrator but against the administrator *de bonis non*.

The debt due by the executor to his testator was legal assets by the Act of 1798, c. 101, § 3, cl. 7, and cl. 14. Every debt due to the testator is assets.

Mr. Marbury, in reply. Debts due to the testator are not assets until recovered. They may be good or bad; *sperate* or *desperate*, and the executor is not to be charged with them until they are recovered.

The COURT, (MORSELL, J., not sitting,) was clearly of opinion that the executor is not liable upon his bond, for neglect of the duty stated in the replication, until that duty shall have been established in the mode pointed out in the Maryland Testamentary Act of 1798, c. 101, § 20, cl. 8.

Judgment for the defendant upon the demurrer.

WILLIAM HOLLENBACK v. MICHAEL MILLER & WIFE.

Trover will not lie against husband and wife for a conversion to her use only.

IN TROVER, the declaration stated that the defendants, (husband and wife,) converted the goods "to her own use."

Mr. J. Dunlop, moved in arrest of judgment, that there cannot be a conversion to the use of the wife during the coverture. 2 Saund. 47, note; *Rhemes v. Humphreys*, Cro. Car. 254; *Perry v. Diggs*, Cro. Car. 494.

Judgment arrested (*nem. con.*) for that reason.

REBECCA BLODGET v. WILLIAM THORNTON.

Upon a writ of dower, the marriage may be proved by parol evidence of cohabitation as man and wife.

WRIT OF DOWER. Verdict for the plaintiff, subject to the

opinion of the Court, whether parol evidence of cohabitation as man and wife, is sufficient to prove the marriage.

Mr. C. C. Lee, for the defendant, contended that the marriage can only be proved by the certificate of the bishop, or of the clergyman who married them.

The following authorities were cited by *Mr. Lee*. *Jackson v. Claw*, 18 Johns. 346; *William v. Gwyn*, 2 Saund. 45; 1 Phil. Ev. 262; *Starkie*, 939; *Birt v. Barlow*, Doug. 172; *Morres v. Miller*, 1 W. Bl. 632.

Mr. R. S. Coxe, (*contra*,) cited *Birt v. Barlow*, Doug. 172; *Morres v. Miller*, 4 Burr. 2058; Bayard's Peake, 88. See also Woodfall's Landlord and Tenant, 402; Henry St. George Tucker's notes to 1 Bl. Com. 440, n. 3.

The COURT (*MORSELL, J.*, absent,) ordered the judgment to be entered for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1827, AT ALEXANDRIA.

FURLONG v. COLEMAN.

If the defendant has obtained a rule on the plaintiff to give security for costs, the Court, at a subsequent term will presume that the fact of non-residence of the plaintiff was sufficiently proved, or admitted; and the burden of proof of residence is then on the plaintiff.

A RULE, on the plaintiff, to give security for costs was laid on the 2d day of the last term.

Mr. Hewitt, for the defendant, now objected that the rule was laid without any evidence being produced of the non-residence of the plaintiff; and that the defendant must now produce such evidence before he can obtain judgment against the plaintiff upon the rule.

The COURT (THRUSTON, J., absent,) said, that the rule being laid at the last term in open court, and not objected to, at that time, the burden of proof was now on the plaintiff to show that he was a resident of the county at that time. That the plaintiff, and his counsel were bound to take notice of all the orders made by the Court in the cause.

UNITED STATES v. SHACKELFORD.

Upon an indictment for unlawfully carrying a challenge to fight a duel, a *scienter* must be proved.

INDICTMENT for unlawfully carrying a challenge to fight a duel.

Mr. Taylor, for the defendant, contended that it was necessary for the United States to prove that the defendant knew it to be a challenge. It could not be "unlawfully" carried if he was ignorant that it was a challenge.

Mr. Swann, for the United States, contended that the defendant was bound to know; and that he carried it at his peril.

The COURT decided, *nem. con.*, that the *scienter* must be proved;

United States v. Helriggle.

and the circumstances that the letter was not sealed, and that the defendant declared that he thought it was a legal notice, were for the consideration of the jury in deciding whether the defendant knew it was a challenge.

UNITED STATES v. HELRIGGLE.

The Court in Alexandria county will, on motion, quash an indictment for misdemeanor, unless the name of a prosecutor be indorsed thereon, according to the Virginia Statute of the 13th of November, 1792, § 24, although the defendant should have been bound by recognizance before a justice of the peace to appear in this Court to answer for the offence.

INDICTMENT for assault and battery.

The defendant had been bound by recognizance before a justice of the peace to appear in this Court to answer for the offence.

Mr. Taylor, for the defendant, moved the Court to quash the indictment, because the name of a prosecutor was not written at the foot of the indictment before it was sent to the grand jury, according to section 24 of the Virginia Act of November 13, 1792, p. 105.

Mr. Swann, for the United States, said that where the party has been recognized to appear in this Court to answer for a misdemeanor, his practice has been to send up an indictment to the grand jury without the name of a prosecutor.

By section 24 of the Act of November 13, 1792, it is enacted as follows: "No information for a trespass or misdemeanor shall be filed in any court but by express order of the court entered on record, nor unless the party supposed to be culpable shall have failed to appear and show good cause to the contrary, having been required to do so, by a summons appointing a convenient time for that purpose, served upon him or left at his usual place of abode; and the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of the information before it be filed; and of every bill of indictment for any trespass or misdemeanor before it be presented to the grand jury."

And by section 38 of the same act, (p. 106,) it is enacted, "That in all indictments for assaults and batteries, and other offences not capital, now depending or hereafter to be prosecuted, it shall be lawful for the court before whom the same shall be depending, upon good cause to them shown, to compel the prosecutor to find security for payment of the costs; and if such

prosecutor shall fail to give security accordingly, the indictment shall be dismissed with costs."

By section 2 of the Act of Virginia of December 2, 1795, it is enacted, "that when any presentment shall be made of any offence, by the grand jury, upon the knowledge of two of their body, the names of the grand jurymen giving the information shall be indorsed at the foot of the presentment; and when any presentment, information, or indictment shall be made, by the grand jury, of any offence, upon the testimony of a witness called upon by the court or grand jury to give testimony concerning the same, the name of such witness shall likewise be indorsed thereon; but in none of the cases above mentioned shall the person or persons, so informing, be liable to costs."

On the 28th of January, 1802, after the separation of this county from Virginia, the Legislature of that State passed an act, (p. 431) stating that "doubts have arisen whether any information can be filed, or indictment for trespass or misdemeanor be sent to a grand jury, unless the name of a prosecutor be written at the foot of such information or indictment;" and providing that no prosecutor should be required on an information or bill of indictment for a trespass or misdemeanor filed, or sent to a grand jury, on and in consequence of a previous presentment of a grand jury made on their own knowledge, or on the information of any two of their own body.

The COURT (MORSELL, J., *contrà*,) quashed the indictment.

See the 29th rule of practice of this Court, *The United States v. Shackelford*, in this court at April term, 1828, *post*; *The United States v. Hollinsberry*, at November term, 1829, *post*; *Commonwealth v. Leap*, in this court, April term, 1801, (1 Cranch C. C. 1); *The United States v. Sanford*, July 14, 1806, *Id.* 323; *The United States v. R. B. Jamesson*, January, 1802, *Id.* 62; *The United States v. Singleton*, June, 1805, *Id.* 237; *The United States v. Willis*, November, 1808, *Id.* 511; *The United States v. Carr*, November, 1823, (2 Cranch, C. C. 439.)

UNITED STATES v. JAMES BIRCH AND OTHERS.

A colored man is not a competent witness in Alexandria against a colored man indicted jointly with white men for a riot.

JAMES BIRCH, a white man, was indicted jointly with others for a riot. One of the defendants, William Bill, was a colored man.

Mr. Swann, for the United States, offered Wilfred Mortimer,

a colored man, born of a white woman, as a witness for the prosecution against the colored defendant, William Bill.

Mr. Mason, for the defendants, objected.

By the 5th section of the Virginia Act of 7th of December, 1792, (p. 187,) it is enacted that "No negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes; or in civil pleas where negroes or mulattoes alone shall be parties."

The COURT (THRUSTON, J., absent,) rejected the witness; because it was a joint indictment, and the defendants had pleaded jointly; and the testimony, if given against one, would operate against all.

SMEDLEY'S EXECUTOR v. W. YEATON.

The master of a vessel, who is also consignee of the cargo, has thereby the authority of supercargo during the voyage.

ASSUMPSIT, for not delivering fifty barrels of flour, shipped on board the defendant's schooner, *Hero*, for Barbadoes, consigned to the master, W. Sowle. The pumps being choked by corn, 113 barrels of the cargo of flour were damaged.

The vessel put into Norfolk, where the damaged flour was taken out and sold, and the same number of barrels of good flour put on board in place of the damaged flour.

In order to prove the replacing of the flour, *Mr. Taylor*, for the defendant, offered to read in evidence an account rendered by J. R. Harwood, of the sales of 113 barrels of damaged flour, and the supply of 113 barrels of good flour, which account was verified in the usual manner by the signature of W. Sowle, the master and consignee, who died before the trial.

Mr. Hewitt, for the plaintiff, objected that it was the mere act of the master, in his character of master of the defendant's vessel, and not in his character of consignee, which did not arise, nor did his agency for the shipper commence until the arrival of the flour at Barbadoes.

Mr. Taylor and *Mr. Mason*, for the defendant, contended that the master, who was consignee, had thereby the authority of supercargo to receive the good flour in lieu of the damaged; and that his certificate or acknowledgment of the receipt of the flour was evidence for the defendant.

And of that opinion was the COURT, (THRUSTON, J., *contra*.) See *Biggs et al. v. Lawrence*, 3 T. R. 454.

LYNN, Executor of Wise, v. YEATON.

If a deed of trust, for the benefit of children, be set aside by a decree in equity, as being fraudulent as to creditors, and the trustee, who is also executor of the grantor, be decreed to sell, and pay the creditors out of the proceeds of the trust property; those proceeds are assets, as to the creditors; and the money, paid to them, is money paid by the executor; and may be recovered by him, as executor, from the person for whose use he paid it.

ASSUMPSIT for money paid, laid out, and expended by the plaintiff, as executor of the will of John Wise, out of the assets, to discharge a debt due by the defendant to Robert Young, for which Wise was surety.

Verdict for the plaintiff, subject to the opinion of the Court, upon the following case:

John Wise made his will, and made the plaintiff his executor, and afterwards made a deed of trust to the plaintiff of all his property, for the benefit of his children and grandchildren.

Robert Young, a creditor of John Wise, brought suit in equity against the *cestuis que trust*, and the trustee and executor, to set aside the deed as fraudulent as to him; in which such proceedings were had that the Court decreed that so much of the funds in the hands of Lynn, as trustee, should be sold by him to pay the debt to Robert Young, the complainant in that suit; and that he should charge the same to the respective *cestuis que trust*, according to their respective interests in the trust-fund; and that he transfer the residue of the trust-fund to the *cestuis que trust*, in proportion to their respective interests therein.

Under this decree the trustee paid the debt to R. Young, and now brings suit, as executor of John Wise, against W. Yeaton, to refund the same, for the benefit of the *cestuis que trust*.

Mr. Taylor, for the defendant, contended that the money paid by the plaintiff to R. Young, never was assets of the estate of John Wise, and never was in his hands as executor, and therefore he could not, in that character, recover it of the defendant. The money either belonged to him as trustee, or to the *cestuis que trust*.

Mr. Jones, *contrà*. The deed was fraudulent, and therefore did not prevent the passing of the property to the executor; because the executor represents the creditors, and as to them the deed was void. If there had been no executor, it would not have been necessary for the creditors to have brought their suit in equity. They might at once, have resorted to the grantee, and charged him, at law, as executor *de son tort*. *Barber v. Fox*, 2 Saund. 137, note. The effect of the decree is to nullify the deed, and to make the property assets; and the plaintiff, as exe-

Riggs v. Swann.

cutor, has a good right to recover from the defendant, the amount of the assets thus applied to his use.

Mr. Taylor, in reply. The deed was good between the parties and those claiming under them. The executor cannot maintain an action, or assert a claim, which the testator could not maintain or assert. The deed was good against subsequent creditors. The testator was estopped by his own deed. The plaintiff could not have been charged at law with this property as assets. If the executor and trustee had not been the same person, the executor could not have recovered this property from the trustee as assets. The plaintiff did not, as executor, pay the money to R. Young. He paid it under the decree, in his character as trustee, and in that character he was decreed to pay it, and to transfer the residue to the *cestuis que trust*; which he could not have done in his character of executor.

The COURT (*nem. con.*) ordered the judgment to be entered up on the verdict for the plaintiff, being of opinion that the money arising from the sales, was assets to the extent of the claims of the creditors, and that the plaintiff paid it in his character of executor.

ROMULUS RIGGS v. SWANN *et al.*, Trustees and Stockholders in the Merchants Bank of Alexandria, and others.

The stockholders of an unincorporated banking company are individually liable in equity to the holders of the notes of the company, issued while they were stockholders, notwithstanding an article of their association, declares that the joint stock or property of the company, should alone be responsible, for the debts and engagements of the company; and that no person who might deal with the company, or to whom they should become indebted, should, on any pretence whatever, have recourse against the separate property of any present or future member of the company, or against their persons, further than might be necessary to secure the faithful application of the funds thereof, to the purposes to which, by those articles they were liable. The date of each note is *prima facie* evidence of the time it was issued.

The holder may have relief in equity, to the full nominal amount of the notes held by him, without showing that he gave any value therefor.

Each stockholder is liable to the full extent of all the notes held by the plaintiff, and issued while he was a stockholder.

It is not necessary that the members of the company named in the bill, but not served with process to appear, should be parties to the suit, although the bill as to them should be taken for confessed.

BILL IN EQUITY to charge the stockholders in the Merchants Bank of Alexandria, personally, for the notes of the bank.

The bill states that John Anderson and sixty-one other persons, who are named in the bill and prayed to be made defendants, entered into an association or copartnership, which was commonly known by the name of the Merchants Bank of Alex-

andria. That they entered into certain articles of copartnership or association, a copy of which was annexed to the bill, and made part thereof. That they carried on the business of banking until May, 1816; when, either by mismanagement, or by a fraudulent issue of paper beyond their means of payment, they became embarrassed and stopped. That sundry notes or bills issued and put in circulation by the bank, amounting to \$20,000, "have regularly come to the possession of" the plaintiff, "no part of which have as yet been paid," nor does he believe that any provision has been made for the same; except, that subsequent to the failure of the bank, namely, on the 19th of December, 1816, a deed, a copy of which is exhibited as part of the bill, was executed by Peter Saunders and others, as President and Directors of the Merchants Bank, by which all the property, real and personal, of the bank, was conveyed to Thomas Swann, Colin Auld, and E. J. Lee, (who are made defendants,) in trust to pay "the balances due to sundry banks in the city of Baltimore and elsewhere," and the residue to be equally divided among all the creditors of the bank *pari passu*. That under that clause of the trust, sundry banks, which are named in the bill, and made defendants, have claimed priority of payment. The plaintiff denies the power of the president and directors to bind the funds of the bank by such a deed, or to create any such preference after the bank had failed and the institution was dissolved; and denies that the description of the preferred banks, is sufficiently definite, to give them the preference. He states that the funds of the bank are insufficient to pay all the debts without resorting to the separate property of the individual members of the association, who deny all responsibility for the debts of the bank. He prays an account of the funds in the hands of the trustees, and of the debts due by the bank; and that the deed may be vacated; and that the plaintiff's claim may be paid out of the joint funds as far as they will go; and that the balance may be decreed to be paid by the individual members of the association; and for general relief.

The eleventh article of the articles of association, declares that every member, when he ceases to be a stockholder, shall cease to be one of the company.

The fifteenth article declares, that "it is expressly and explicitly declared to be the object and intention of the persons who associate under the style and firm of 'The Merchants Bank of Alexandria' that the joint stock or property of the said company, (exclusive of the dividends to be made in the manner before mentioned,) shall alone be responsible for the debts and engagements of the said company; and that no person who may

deal with the company, or to whom they may, or shall in anywise, become indebted, shall, on any pretence whatever, have recourse against the separate property of any present or future member of this company, or against their persons, further than may be necessary to secure the faithful application of the funds thereof, to the purposes to which by these presents they are liable. But all persons accepting any bond, bill, or note, or contract of this company, signed by the president, and countersigned or attested by the cashier of the company for the time being, or dealing with it in any other manner whatever, thereby respectively give credit to the joint stock or property, of the said company, and thereby respectively disavow having recourse, on any pretence whatever, to the persons or separate property, of any present or future member of this company, except as above excepted.

By the articles of association, the joint stock might consist of one million of dollars, divided into 10,000 shares of \$100 each; of which ten dollars a share were to be paid at the time of subscribing, and the residue when called for by the directors, so that not more than five dollars on each share should be called for at any one time, excepting the second instalment, which might be ten dollars a share.

The notes were in the common form of bank-notes but payable to C. McKnight or order, on demand, and by him indorsed in blank.

Twenty-four of the defendants answered.

One of them, Joseph Mandeville, stated that he had not, for a long time, owned any stock in the bank, and did not believe that the notes now claimed by the plaintiff, were issued while he was a stockholder. He did not admit them to be genuine notes of the bank, (not having seen them,) nor that payment had ever been demanded of the bank. He believed they had been bought up by the plaintiff, on speculation, after the failure of the bank, and relied on the fifteenth article of association. Some of the defendants denied that they ever were stockholders, and others averred that their names had been used without their consent. Some admitted that they had been stockholders for a short time, but could not say when.

The following facts were agreed by the parties.

1. That the articles of association were repeatedly published in the Alexandria newspapers before the commencement of the operations of the bank under the articles.

2. That the fifteenth article was printed, and copies of it pasted in the bank-books of the customers and dealers at the bank, and posted in a public part of the banking-room, exposed to the view of all persons entering the said bank.

3. That the bank stopped payment and failed, about the 11th of May, 1816.

4. That C. McKnight, to whose order the notes in question were made payable, was, at the time and times of issuing the same, a clerk in the said bank; and that the notes were made payable to his order for the purpose of being indorsed by him in blank, and so thrown into circulation, and passed from hand to hand, as bank-notes, without any value or transaction passing between him and the said bank.

5. That the plaintiff always resided in Georgetown, District of Columbia, and frequently visited Alexandria, but was not a customer or dealer with the said bank.

6. That the said bank-notes are in the following form:—

(5) Capital one { Vignette. } million dollars. (5)
No. 1701. No. 1701.

The Merchants Bank of Alexandria, promises to pay to C. McKnight or order, on demand, five dollars. Alexandria, July 13th, 1815.

C.

F. Marsteller, President.

James S. Scott, Cashier.

It appears by the reports of the trustees on the 15th of December, 1820, and 7th of May, 1824, that all the available funds of the bank, were exhausted in expenses of the trust. And by the master commissioner's report, the plaintiff's claim appears to be \$21,661.25 upon notes of the bank, dated at various times from May 25, 1815, to March 2, 1816, inclusive; the greater part in 1815. By the master's report of December 3, 1825, it appears that 10,000 shares, amounting to one million of dollars, were subscribed for on the 23d of May, 1815, payable by instalments when called for. The instalments called for, including ten dollars a share at the time of subscribing, amounted to \$250,000; of which sum there remains due from the stockholders the sum of \$68,775; the sum of \$183,550 having been paid either in money, or by stock-notes discounted for that purpose; so that there remains due from the stockholders, in order to complete the contemplated capital of one million of dollars, the sum \$816,450; of which the sum of \$360,825 is due from original subscribers and \$455,625 from transferees.

The cause was set for hearing on the bill, answers, replications, depositions, exhibits, reports, and the admissions of the parties. The case was argued at November term, 1826, by *Mr. Taylor* for the plaintiff, and by *Mr. Hodgson*, *Mr. Swann*, and *Mr. Jones*, for the defendant.

Mr. Taylor, for the plaintiff.

Riggs v. Swann.

The 1st question is whether the stockholders are individually liable for the notes of the bank.

There is no evidence that the plaintiff had notice of the articles of association. There was no reference to them upon the face of the notes. Individual stockholders are liable to the public, whatever may be the agreement among the stockholders themselves. *Rex v. Dodd*, 9 East, 516, 525, 526, 527; *Waugh v. Carver*, 2 H. Bl. 235; *Gow on Part.* p. 4, 5, 9, 17, 18; *Ensign v. Wands*, 1 Johns. Cases, 171.

Mr. Hodgson, Mr. Swann, and Mr. Jones, for the defendants, contended,

1st. That the notes were void, because issued contrary to the law of Virginia, in force in the county of Alexandria, which declares it to be not lawful for any person to offer in payment a private bank-bill or note for money payable to bearer.

2d. That, if not void, the stockholders are not individually liable.

1. Upon the first point they cited *Bartlett v. Vinors*, Carth. 252; 1 Powell on Contracts, 163, 164, 165, 166, 167, &c.; *Biggs et al. v. Lawrence*, 3 T. R. 454. The Act of Virginia of December 2, 1785, § 1, (p. 16,) which is in these words — “Be it enacted by the General Assembly, That it shall not be lawful for any person to offer in payment a private bank-bill or note for money payable to bearer; and whoever shall offend herein shall not only forfeit to the informer ten times the value of the sum mentioned in such bill or note, but may be apprehended by warrant from a justice, and upon due proof of the fact made to him, or upon his own acknowledgment thereof, be bound to the good behavior; or if he afterwards offend in the like manner, it shall be deemed a breach of the recognizance.” 1 Fonbl. 36; *Holman v. Johnson*, Cowp. 343; 1 Powell on Contracts, 174; *Ex parte Mather*, 3 Ves. 373; *St. John v. St. John*, 11 Ves. 536; *Morris v. McCulloch*, Ambler, 432; *Hunt v. Knickerbocker*, 5 Johns. 327; *Denniston v. Cook*, 12 Johns. 376; *Hannay v. Eve*, 3 Cranch, 242–247; *Wilson v. Spencer*, 1 Rand. 76.

2. If the notes are not void as being in effect payable to bearer, in violation of the law of Virginia, yet the stockholders are not individually liable. The plaintiff has produced and offered the articles of association in evidence, as part of his title. He claims under them, and is therefore bound by them. In proving a partnership, he has proved a special qualified partnership. The articles are not merely an agreement among the stockholders, and binding upon them only, but they enter into and bind all persons dealing with the bank with notice of the articles. Such publicity was given to the articles, that there can be no

doubt that the plaintiff had notice of them before he purchased the notes in question. But if the stockholders should be personally liable, to what extent are they liable? Is each liable for all the debts of the bank? Is an original stockholder liable for notes issued after he sold out his shares? Is the purchaser of shares liable for notes issued before he became a stockholder?

But the bill does not state a case of equity. If the plaintiff has a right to recover, it is at law, not in equity.

Mr. Taylor, in reply, was stopped by the COURT, (THRUSTON, J., absent,) as to the question of equitable jurisdiction, being of opinion that the trust-fund, the partnership, and the other circumstances, gave jurisdiction to a court of equity.

The Act of Virginia, he observed, does not apply to notes payable to order, although indorsed in blank, and such has been the universal understanding in that State; so that on the 24th of February, 1816, its legislature passed a law to make void all notes issued by unchartered banks. Besides, the penalty of the act is not for issuing, but for offering in payment, any such note. The offence is committed (if committed,) by the indorser, not by the bank.

The answers of the defendants admit that the plaintiff is entitled to payment out of the joint funds. What are the joint funds? The capital subscribed? Or the capital paid in? Or the capital called for by the instalments? The capital subscribed was one million of dollars; and the stockholders are bound to make up the joint funds to that amount, if necessary for the discharge of the obligations of the bank. The instalments called for amount to \$250,000. To that extent at least they are liable. They are bound, at least, for the damage sustained by the fraud of their agents, who held out to the world a capital of a million of dollars. *Dr. Salmon v. The Hamborough Company*, 2 Vernon, 396, note.

Mr. Taylor admitted that the plaintiff had not a right to call on a stockholder, who was not such at the time the notes were issued; but contended that the date of the notes was *prima facie* evidence of the time of issuing them, and of the time when the debt accrued.

The judges present at the first argument not being able to agree upon a decree, the cause was argued again at November term, 1827, by *Mr. Taylor* and *Mr. Key* for the plaintiff, and by *Mr. Swann* and *Mr. Jones* for the defendants.

This argument was substantially the same as the first, with the following additional authorities cited by *Mr Swann*, upon the question of illegality of the notes. *Wookey v. Pole*, 4 B. & A. 6, 7, 8; *Collins v. Martin*, 1 B. & P. 649; *Miller v. Race*, 4

Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516; *Peacock v. Rhodes*, Doug. 636; *Patton v. Nicholson*, 3 Wheat. 204, 207; *Belding v. Pitkin*, 2 N. Y. T. R. (2 Caines,) 147; *Edie v. East India Co.* 1 W. Bl. 298. And upon the question of the individual responsibility, *Izett v. Mountain*, 4 East, 371.

The COURT (CRANCH, C. J., *contra*,) were of opinion that the defendants were personally and individually liable.

CRANCH, C. J. The 1st question is, Has the plaintiff made out a case for equitable relief, either against the joint funds of the association, or against the individual stockholders?

The plaintiff does not say that he is interested in the notes which he holds, nor that he paid any value for them; but simply says they regularly came to his possession, and have not been paid. Does this bare possession entitle him to relief in equity? Would it entitle him to recover at law? I am inclined to think it would. If he has a legal right to recover judgment at law, and, by reason of the partnership, or of the deed of assignment of the joint funds to the trustees, he cannot obtain the fruit of his judgment, has he a right to resort to a court of equity in the first instance, or should he not proceed to judgment at law? If it be apparent that he cannot get satisfaction at law, and that he may in equity, I think he may resort to equity first. If it were clear that the plaintiff had a complete remedy at law against the individual members of the association, without regard to the disposition made of the joint funds, I should say he had no remedy in equity. But if there be joint funds, a court of equity would, perhaps, under the circumstances of this case, restrain the plaintiff from proceeding at law against the individual property of the stockholders, until it is ascertained that the joint funds were exhausted. By "the circumstances of this case" I mean the declaration by the copartners that the joint funds only should be liable for the joint debts. If that declaration were published, in such a manner as to render it probable that the dealers with the bank, and all who should receive its notes, would have notice of it, I think the stockholders have a right, in equity, to require that the plaintiff should, at least, look to the joint funds first. If such be their rights, and the plaintiff chooses to resort to a court of equity, I think it does not become the defendants to object to his resorting to that forum, in the first instance. There was apparently a trust-fund, of which the plaintiff could not avail himself at law; but in equity he may compel the trustees to execute the trust. This alone would be a good ground to support the jurisdiction of the court of equity.

But is the plaintiff entitled to relief, in equity, against the individual persons and property of the stockholders?

If the court has jurisdiction of the cause on one ground, it must proceed to give the plaintiff all the relief to which he is entitled, although the ultimate relief be such as he might, perhaps, have obtained at law. The plaintiff had a right to call on the trustees to account for the joint funds. They have done so by their reports, which appear to have been received as their answer; and it appears that all the funds have been exhausted by the expenses of the trust.

The question then occurs, Is the plaintiff entitled to a personal decree against the individual stockholders?

In the ordinary case of a general partnership, he would be. But it is said that the publication of the 15th article of association makes this case an exception to the general rule; and that the publication was made in such a manner that the plaintiff must be presumed to have known the article at the time of his receiving the notes; and, if he did know it, he is bound by it, because it then became part of the agreement between him and the stockholders.

This principle appears to me to be correct; and I think the publication of the articles was such as to raise the presumption that the plaintiff had notice of them when he received the notes, especially as he has produced these articles and made them part of his bill; and that by receiving them with that notice he agreed to look only to the joint funds. The creditors of the bank, by those articles, were not, "on any pretence whatever, to have recourse against the separate property of any present or future member of the company, or against their persons, further than might be necessary to secure the faithful application of the funds thereof to the purposes to which, by those articles, they were liable." Of what were those funds to consist? Of the joint stock which was actually raised, and of its profits, and of the debts due to the bank.

What amount of stock was raised? By the 1st article of the association it is said that "The capital stock of said company may consist of one million of dollars, divided into shares of 100 dollars each, to be paid as follows: ten dollars on each share at the time of subscribing; the president and directors may call for ten dollars more upon each share in sixty days thereafter, giving thirty days notice thereof; the remainder at such times and in such sums as the president and directors may order," upon thirty days' notice, and not exceeding five dollars at any one time.

By the 13th article, "If any stockholder should fail to pay up the several instalments on his stock as the same may become due, his dividend upon all such instalments as he shall have previously paid shall cease as to him," and shall remain to the use

of the company. And by the 11th article the shares were transferable, and every stockholder, whether by original subscription or transfer, was to be considered a member of the association, and, upon ceasing to be a stockholder, should cease to be a member.

The amount of stock actually called for, including what was paid at the time of subscribing, was \$250,000, being \$25 on each share. Of that sum \$183,550 have been paid either in money, or stock-notes discounted for that purpose; and there remain due from the stockholders, \$68,775. These delinquent stockholders were the debtors of the bank to that extent; and the right of the bank to compel payment was assigned to the trustees with the other effects of the bank.

Are the other stockholders bound to make good this delinquency to the creditors of the bank? I think not. By the articles of association, it is evident that they did not engage to do more than pay their subscriptions when called for, and to see that the actual and available funds of the bank were faithfully applied. By these articles the plaintiff is bound in consequence of his presumed notice of them, at the time of receiving the notes; and he cannot call upon the stockholders to do more than, by those articles, they engaged to do.

The available funds have all been assigned to the trustees, and they have accounted for them. I am therefore of opinion,

1. That the plaintiff would have a right in equity to proceed against the joint funds, if there were any.

2. That there are no joint funds in the hands of the defendants.

3. That the individual stockholders are not liable beyond their subscriptions.

4. Nor beyond the instalments called for.

5. Nor to make good the delinquencies of the other stockholders.

6. And that the bill ought to be dismissed with costs.

The bill had been regularly taken for confessed, against such of the defendants as had been served with process to appear, and who had not answered; but no order of publication had been taken against the absent defendants. Some of the original defendants had died, and the proceedings were not revived against their representatives.

On the 5th of December, 1827, the COURT, (CRANCH, C. J., *contra*) made the following decree:

“This cause coming on to be heard upon the bill, answers, depositions and reports, and the arguments of counsel being heard, it is thereupon considered by the Court, and by the

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authority thereof ordered, adjudged, and decreed, this 5th day of December, A. D. 1827.

That inasmuch as it appears to the Court, from the reports and evidence in the cause, that there are no funds, in the hands of the trustees, Thomas Swann, Edmund J. Lee, and Colin Auld, mentioned in the said bill, arising from the sales made under the former order of the Court in this cause to be paid or distributed to the complainant or other creditors, as to the said defendants, the said trustees, the bill of the complainant should be dismissed, and it is accordingly hereby so decreed.

And it is hereby further ordered and decreed, that the following named defendants, Joseph Mandeville, John Jackson, Daniel Somers, James S. Scott, Alexander Moore, Thomas Semmes, Thomas Mount, Hugh Carolin, James R. Riddle, and Benjamin Baden, pay to the complainant, the sum of \$20,000 with interest thereon, from the 1st January, 1818 and costs.

And it appearing to the Court that, of the sum reported to be due to the complainant, the notes of the said Merchants Bank to the extent of \$1990 only had been issued during the time the said Carolin continued to be a member; and \$1145 only had been issued during the time the said Benjamin Baden was a member, the above decree as to them, may be discharged by their respective payments of the said sums of money and costs.

And as to all the other defendants in the said bill of complaint named, it appearing to the Court that they are, either not served with process to appear in said cause, or, where served with process, not charged by any evidence on the part of said complainant, the bill of the complainant is hereby decreed to be dismissed with their costs."

Upon an appeal to the Supreme Court of the U. S., this decree was reversed, for error in dismissing the bill against the defendants, upon whom process was not served, and also against the defendants, against whom the bill was taken for confessed; and in not requiring the suit to be revived against the personal representatives of those parties who were served with process, and died during the pendency of the said suit, who were known and might have been brought before the Court. 2 Peters, 482.

C. J. CATLETT v. THE COLUMBIAN INS. CO.

In adjusting a loss upon a policy for \$10,000 on a cargo from Alexandria, D. C. to

St. Thomas and two other ports in the West Indies, and back to the U. S., the value of the cargo is to be ascertained at the port from which the vessel last sailed before the loss, and if freight has there been earned and not paid, and is not chargeable upon the salvage, it is an addition to the value of the original cargo, upon which the loss is to be adjusted.

THIS was an action upon a policy of insurance, dated February 16, 1826, whereby the defendants insured the plaintiff \$10,000, lost or not lost, at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the U. S., upon all kinds of lawful goods and merchandize, laden or to be laden on board the ship Commerce, until the same should be safely landed at St. Thomas, &c. and the United States. The goods and merchandise to be valued as interest might appear.

At the trial, a verdict was found, by consent, for the plaintiff, for \$10,000, subject to the opinion of the Court, upon a demurrer to the evidence. And it was further agreed, that if it should be the opinion of the Court that the plaintiff was not entitled to recover the full amount of the insurance, but was entitled to an average loss, a reference should be made to an auditor to ascertain the average, and the verdict should be modified accordingly, subject to exceptions, &c. The reference was made and the report, among other things, charged the freight from Alexandria to St. Thomas upon the salvage; the freight being \$2,041.25.

It appeared from the demurrer to the evidence, that the ship sailed from Alexandria, on the 14th of February, 1822, having on board a cargo of 2297½ barrels of flour, of the invoice price of \$15,841.24. The ship and cargo were both owned by the plaintiff. She arrived safe at St. Thomas on the 21st of March, where she continued until the 30th of May, for the purpose of selling her cargo. During this period, the master, who was also consignee, sold by retail 509½ barrels. Being limited by his instructions, to \$8 a barrel, and not being able to procure that price for the residue of the cargo, he sailed on the 31st of May, for Cape Haytien, with it, and 30 doubloons, amounting to \$480, part of the proceeds of his sales at St. Thomas. The 509½ barrels of flour sold at St. Thomas according to the invoice price, amounted to \$3,512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at \$12,328.25.

On the 6th of June, the ship was wrecked off Cape Haytien, and 155 barrels of flour were totally lost; 1633 were landed; the greater part damaged, and the whole was sold. The gross amount of sales at Cape Haytien, was \$9,391.34. The expenses of salvage, including commissions on sales, were \$4,124.72.

The proportion of the captain's expenses attaching on the cargo was \$285.78.

Of the proceeds of the sales at Cape Haytien, the sum of \$4,953.89 was invested in coffee, which was shipped to Baltimore, where it produced only \$3,517.40.

Upon the auditor's report, the Circuit Court rendered judgment for the plaintiff, for \$7,656.57, with interest from October 14, 1822.

The defendants carried the cause to the Supreme Court of the United States, by writ of error, where the judgment was affirmed as to every point, except the charging the freight from Alexandria to St. Thomas against the goods saved, (a point not raised in the Court below;) upon which point the judgment was reversed. Mr. Justice Johnson, strongly dissenting.

After the opinion of the Supreme Court was pronounced, it was discovered that the auditor's report was incorrect in some other particulars, and required a different adjustment, and the following additional opinion was subsequently delivered by the Court.

"Mr. Justice Story. In consequence of the former opinion delivered in this cause, the parties have found it necessary to re-adjust the auditor's report in several particulars not suggested at the former argument. Indeed, upon that argument the parties assumed that the report was perfectly correct, except as to the item of freight. We have examined the report, and are satisfied that the original plaintiff is entitled to recover the sum of \$6,626.18, with interest from the 14th of October, 1822, which is the residue of the sum of \$10,000 insured by the company, deducting the premium note, and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the Circuit Court is to be reformed accordingly."

The judgment of the Supreme Court was as follows;

"This cause came on, &c. On consideration whereof, it is ordered and adjudged by the Court, that there is error in so much of the judgment, as allowed to the said Catlett, as freight to be deducted from the salvage, the sum of \$2,041.25.

"And it is further ordered and adjudged, that upon reformation of the auditor's report, required by the disallowance of the freight aforesaid, and otherwise, there is now due and payable to the said Catlett, the sum of \$6,626.18, together with interest thereon, from the 14th of October, 1822, the said sum being the balance of the sum of \$10,000 insured, after deducting the amount of the premium due on the policy, viz. \$376, and also the proportion of the salvage belonging to the said Columbian

Insurance Company, viz. \$2,997.82, received by the said Catlett; and that the judgment of the Circuit Court, to the amount of the said sum of \$6,626.18, and interest thereon from the 14th of October, 1822, be and hereby is affirmed; and as to the residue of the said judgment, be and is hereby reversed; and the cause is to be remanded to the said Circuit Court, with directions to enter judgment for the said Catlett accordingly; the parties in the court below to be at liberty to open the auditor's report, so far as respects the item for \$480, the proceeds of the doubloons; and the item for \$719.37, paid over to Captain McKnight; and the judgment to be varied by the Circuit Court, as these items may be found for either party; execution, however, to be granted immediately for the balance of the judgment, deducting the said sum of \$719.37."

A mandate was issued accordingly, and the cause was again brought before this Court, when

CRANCH, C. J., delivered the following opinion of the Court.

The mandate, in this case, is understood, in effect, to require this Court to render judgment in favor of Mr. Catlett, for \$6,626.18, with stay of execution as to \$719.37, part thereof; and that the auditor's report shall be opened, as to the item for thirty doubloons, equal to \$480, and the item for \$719.37, "paid over to Captain McKnight;" "and the judgment to be varied" by this Court, "as these items may be found for either party."

It appears, by the mandate, that the Supreme Court, in adjusting the loss, have charged Mr. Catlett \$2,997.82, for the underwriter's share of the net proceeds of two hundred bags of coffee sold in Baltimore, and of the \$480 for the thirty doubloons.

The net proceeds of the coffee were \$3,151.30, and the doubloons were \$480; = \$3,631.30.

As \$12,808.25, the whole risk, is to \$3,631.30, the whole amount saved and received by Mr. Catlett, so is \$10,000, the underwriters' share of the risk, to \$2,835.13, the underwriters' share of the amount saved.

The Supreme Court did not take into the adjustment the balance of the net proceeds of the cargo, paid over by Thompson and Creed to Captain McKnight, at Cape Haytien, namely, \$75.02 and \$719.37; = \$794.39. That sum ought to have been brought into the account, whether it was received by the underwriters or by Mr. Catlett. If received by Mr. Catlett, he ought to have been charged with the underwriters' share of it; if received by them, they ought to credit Mr. Catlett with his share of them.

By the auditor's report Mr. Catlett was charged with that sum, as well as with the doubloons; the Supreme Court have

only charged him with the latter. Yet they both stand on the same ground; they were both paid over to Captain McKnight.

The auditor's report was acquiesced in by Mr. Catlett, in this Court, and he seemed to be satisfied with the judgment which this Court gave, confirming that report.

But the auditor's report has been opened again, and we are now requested to disallow the charge against Mr. Catlett for the doubloons, because, it is said, they were stolen from Captain McKnight at Cape Haytien.

Captain McKnight has been reëxamined upon that point. He says he expended part of the doubloons in paying the seamen's wages, and in disbursements and expenses concerning the ship; and that the residue, amounting to about \$351, was stolen from him at the Cape. If they were stolen, are the underwriters responsible? As Captain McKnight was the master of Mr. Catlett's ship, and the supercargo and consignee of Mr. Catlett's cargo, and as Mr. Catlett had accounts to settle with him for wages and compensation, as master, supercargo, and consignee, and as it is the general practice for the insured to receive the salvage in cases of abandonment, it is natural to suppose that Captain McKnight received not only the doubloons, but the balance of the proceeds of the cargo, as agent for Mr. Catlett. I think, therefore, that Mr. Catlett is answerable for whatever proceeds of the cargo were paid over to Captain McKnight. I think, also, that the twenty bags of coffee, purchased by Captain McKnight out of the proceeds of the cargo, and remitted to Baltimore with the two hundred bags, are to be considered as a remittance made on account of the underwriters; and that, as the proceeds came to the hands of Mr. Catlett, he is answerable for the net proceeds only, and not for the prime cost. But, with regard to these two points, the other judge, who heard the cause, has doubts; but they will not affect the judgment which we shall render.

In order to adjust this loss, it is necessary to ascertain the value of the cargo when the ship sailed from St. Thomas for Cape Haytien.

Upon the arrival of the cargo at St. Thomas, freight was earned to the amount of \$1.25 per barrel.

The Supreme Court has decided, that the freight thus earned was not a lien upon the salvage of the cargo in the hands of the underwriters. When, therefore, the ship sailed from St. Thomas for Cape Haytien, the value of the cargo was enhanced by the whole value of the freight. This would not have been the case, if the freight had continued to be a lien upon the salvage of the cargo; for then the salvage would have been indebted to the

exact amount of the benefit; but this cargo had received the benefit, and was relieved from the debt. So that it was really more valuable to the amount of the freight, as if the freight had been paid at St. Thomas, and added to the cargo.

For the purpose of adjusting this loss, the voyage must be considered as commencing at St. Thomas. If half of the cargo had been sold at that island at a profit of one hundred per cent., and the proceeds invested in goods and laden on board the ship, and she had sailed with that cargo for Cape Haytien, and been lost, the value of the cargo must have been ascertained, at the time of her sailing from St. Thomas, in the usual mode; by adding to the invoice price all duties and expenses, and the premium of insurance, as well upon the new cargo taken in, as upon the remnant of the old cargo. One of the expenses allowed, in such cases, is the expense of transportation from the place where the prime cost was ascertained, or where the goods were purchased, to the place where the voyage is to commence. (Marshall, 621, 622; Stevens on Average, 53.) Stevens says:—"When the average is adjusted at the port of loading, and the freight has been paid there, the practice is to add it to the value of the cargo, in the same manner as any other charge incurred on the goods before putting them on board the ship; for the merchant has then an interest in the freight, by its being converted into a charge on the goods."

Mr. Catlett, therefore, had a fair right, in settling this loss, to add to the invoice price of the 1,788 barrels of flour on board, when the ship sailed from St. Thomas for Cape Haytien, \$1.25 on each barrel, for freight from Alexandria. The flour, under the opinion of the Supreme Court, not being liable in the hands of the underwriters for that freight, was really worth so much more; and Mr. Catlett had as good a right, under the circumstances of this case, to charge it, as if he had paid it at St. Thomas.

Upon this principle, Mr. Catlett's interest in the cargo will stand thus:—

1,788 barrels flour, according to invoice price	\$12,328.25
Freight on 1,788 barrels, earned at St. Thomas, at \$1.25	2,235.00
Thirty doubloons	480.00
	<u>\$15,043.25</u>
At the risk of the underwriters	\$10,000.00
" " Mr. Catlett	5,043.25
	<u>15,043.25</u>

Catlett v. The Columbian Ins. Co.

The amount saved is as follows ; —

Net proceeds of 220 bags of coffee	\$3,517.40
Thirty doubloons	\$480.00
Amount overpaid, by Thompson and Creed, on the ship	75.02
Balance paid by them to Captain McKnight	719.37
	<u>\$1,274.39</u>
Deduct prime cost of 20 bags coffee \$481.66	
Captain Mc.K.'s expenses on cargo 285.78	
	<u>767.44</u>
	506.95
Whole amount saved	<u>\$4,024.35</u>

Then, as \$15,043.25, the whole risk, is to \$4,024.35, the whole salvage, so is \$10,000, the underwriters' share of the risk, to \$2,675.19, the underwriters' share of the salvage; leaving \$1,349.16 for Mr. Catlett's share.

Ch. J. Catlett, in account with the Columbian Ins. Co. Dr.

To net proceeds of 220 bags coffee	\$3,517.40
" amount overpaid on ship	75.02
" balance paid T. and C. to Captain McKnight	719.37
" thirty doubloons	480.00
" premium note	376.00
	<u>\$5,167.79</u>

Supra, ... Cr.

By your proportion of salvage	\$1,349.16
" prime cost of 20 bags of coffee	481.66
" Captain McKnight's expenses on cargo 285.78	
" policy	10,000.00
	<u>\$12,116.60</u>
	\$6,948.81
Deduct amount paid under the mandate	5,907.81
Balance due Ch. J. Catlett	<u>\$1,041.00</u>

If, therefore, we were at liberty to vary the judgment for \$6,626.18, which we were ordered by the mandate to enter, we should render judgment in favor of Mr. Catlett for \$6,948.81, instead of \$6,626.18, with directions to enter a credit of \$5,907.81, with interest thereon from October 14, 1822, for

Cloud v. Hewitt.

which execution has already been ordered under the mandate, and should order execution now for the balance, being \$1,041, with interest thereon from the 14th of October, 1822, till paid.

But as the mandate seems to limit the judgment to the sum of \$6,626.18, and execution has been ordered for \$5,907.81, we can only order execution to be issued for the balance of the judgment already rendered, namely, \$719.37, and interest thereon from the 14th of October, 1822, till paid.

If the Court is wrong, in adding the freight earned at St. Thomas to the invoice price of the cargo, the only difference in the above statement will be, that Mr. Catlett must have credit for his share of the salvage, \$882.35, instead of \$1,349.16. The difference is, \$466.81, which, deducted from \$1,041, leaves a balance still due to Mr. Catlett of \$574.19.

Judgment was entered for	\$6,626.18
Amount paid under the mandate	5,907.81
Execution ordered for	\$719.37
with interest from October 14, 1822.	

CLOUD, *qui tam*, v. HEWITT.

In an action for a penalty, under the Virginia Act of 21st December, 1792, "regulating the inspection of flour and bread," it is not necessary that the United States should be nominally a plaintiff, but it may be recovered in an action *qui tam*.

In an action for the penalty for altering the inspector's marks on barrels of flour, it is necessary to set out the marks, and how altered.

The word "condemned" must be branded on the cask, or it is not within the fifteenth nor the tenth section of the act.

THIS was an action of debt *qui tam*, under the tenth and fifteenth sections of the Virginia Act of 21st December, 1792, "regulating the inspection of flour and bread," (pp. 229, 231.)

The declaration had two counts: 1st. Upon the tenth section, for lading on board a ship for exportation twenty barrels of flour, marked "condemned" by an inspector; 2d. Upon the fifteenth section, for altering the inspection marks on twenty-four barrels of flour. The defendant demurred to the declaration.

Mr. Hewitt, for the defendant, contended that, under the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115,] supplementary to the Act concerning the District of Columbia, section 2, it was necessary that the action should be in the name of the United States and of the informer, and that a *qui tam* action by the informer, who sues for himself and the United States, is not sufficient.

But the COURT (*nem. con.*) overruled the objection.

The COURT, however, was of opinion that the second count was bad, in not setting out what the marks were, which were altered, and how they were altered.

Mr. Swann, for the plaintiff, had leave to amend his declaration, and the defendant pleaded *nil debet*.

Mr. Taylor, for the defendant, upon the trial of the issue upon *nil debet*, contended that the evidence did not bring the case within the fifteenth section of the act. That the mark "condemned" contemplated in the statute, means a mark branded; whereas, the evidence is, the mark was only made with red chalk. In the tenth section the word is "marked;" in the fifteenth, the expression is "stamped" or "branded, condemned." It is a highly penal law, seven dollars a barrel, and should be construed strictly. The policy of the law requires that the word "condemned" should be as permanently marked as any other word which the inspector is required to put upon the barrel.

Mr. Swann, contra. The inspector, if the flour is unmerchantable, is, by the tenth section, to "cause the same to be marked, on the bilge, with the word 'condemned,' or secure it for a further examination, if required; which examination the owner shall procure to be made within twenty days." This shows that the mark was to be temporary, not permanent, and if upon such reexamination, the flour shall be found merchantable, "the inspector shall erase out the word 'condemned,' and put such brand on the flour as" the examiner shall direct. The degree of fineness only is to be branded.

The COURT (THRUSTON, J., *contra*), was of opinion that the word "condemned" must be branded on the bilge, or it is not within the fifteenth or the tenth section of the act.

The verdict being for the defendant, upon both counts, *Mr. Swann*, for the plaintiff, moved for a new trial, on the ground of misdirection of the jury by the Court upon the matter of law; and the case was again argued by *Mr. Swann*, for the plaintiff, and *Mr. Hewitt* for the defendant.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., *contra*), as follows:—

This was an action of debt, under the tenth and fifteenth sections of the Act of Virginia, of the 21st of December, 1792, "for regulating the inspection of flour and bread." Rev. Code, 229.

The first count was upon the tenth section, for lading on board a ship, for exportation from the town of Alexandria, in the District of Columbia, twenty barrels of flour marked "condemned," by an inspector in that town.

The second count was upon the fifteenth section, and was for

altering the mark "condemned," which had been put upon the barrels of flour by an inspector.

The Court, upon the trial of the issue upon the plea of *nil debet* had (THRUSTON, J. *contra*,) instructed the jury that the word "condemned" must be branded; or it was not such a mark as was contemplated by the statute.

Upon this instruction the jury found a verdict for the defendant, the marks having been made with red chalk only; which was said to have been the invariable practice under the statute; and it was said that the inspectors had never used a brand for that word; but had always used brands for the four words indicating the four degrees of fineness of the flour, namely, "superfine," "fine," "middling," and "shipstuff."

Mr. Swann, for the plaintiff, moved for a new trial, on the ground of misdirection of the jury, by the Court, on the point of law. This motion has been argued, and the question now to be decided, is, whether the mark "condemned" must be branded on the cask.

The main object of the law was to prevent the exportation of bad flour, whereby the credit of the Virginia flour would be injured in foreign markets.

The fourth section provides that all flour brought to a port "for exportation," shall be made of due fineness, &c.

The fifth section regulates the size and quality of the barrel.

The sixth requires every miller of flour "for exportation," to provide and keep "a distinguishable brand-mark," with which he shall brand every cask of flour and mark thereon the tare and net weight; and inflicts a penalty on any person, who shall remove any cask of flour from the place of manufacture, "not branded and marked as aforesaid." The carrier, who should have paid the penalty, might recover it from the miller, provided he informed him that he intended to carry it, and requested the miller "to secure and brand the said barrels."

The seventh and eighth sections regulate the weight of flour which should be packed in the casks.

The ninth relates to bread only.

The tenth provides that any cask of flour brought to a port, to be from thence laden or shipped for exportation, shall be inspected by an inspector, and if he shall judge it to be well packed and merchantable, he shall "brand the cask in the quarter with the name of the place at which he is inspector, with a public brand-mark, to be provided for that purpose; and shall also brand and mark the degree of fineness which he shall, on inspection, determine the said flour to be of; which degree shall be distinguished as follows, namely, superfine, fine, middling, and ship-

stuff." "No inspector shall pass any flour which shall prove, on examination, to be unmerchantable, according to the true intent and meaning of this act, but shall cause the same to be marked on the bilge with the word 'condemned,' or secure it for a further examination if required; which examination, the owner shall procure to be made within twenty days." It then provides the mode of appeal to three persons, to be appointed by a justice of the peace; "and if they or any two of them, shall pass and declare the same to be merchantable; in such case, the inspector shall erase out the word 'condemned,' and put such brand on the said flour, as they or any two of them shall direct." "It shall not be lawful, for any person to export, or lade on board of any ship or vessel, for exportation out of this State, any cask of flour marked 'condemned' by an inspector; or to export or lade on board any ship or vessel, for exportation, from any port or place within this State, any casks or barrels of flour, not inspected or branded as aforesaid, on pain of forfeiting ten dollars for every cask or barrel exported, or laden on board any ship or vessel, for exportation."

The eleventh section declares, that complaints have been made that evil-disposed persons have packed flour "in old casks which have been branded agreeable to this act," and provides a penalty for so doing.

The twelfth provides for the inspection at certain mills.

The thirteenth contains the form of the inspector's oath, by which, among other things, he swears, "that no flour shall be passed or branded by him, without inspecting the same; that he will not brand, nor cause to be branded as passed, any cask or casks of flour that do not appear to him" to be merchantable; "that he will mark on all casks of flour, the degree thereof, according to the directions of this act; that he will carefully examine the casks," "and that he will not pass or brand any such casks, unless they be of such size, goodness, and thickness, as by this act are required."

The fourteenth section forbids inspectors to purchase flour, unless for their own use.

The fifteenth section provides that, "if any person shall alter the mark stamped on any cask of flour, by an inspector, or shall mark or brand any cask of flour, which has not been inspected, with any mark or brand, similar to, or in imitation of any inspector's mark or brand, or after an inspector shall have passed any cask of flour as merchantable, shall pack, into such cask, any other flour; or after any cask of flour shall be branded 'condemned,' shall unpack, and re-pack the same in other casks, for exportation, such person shall forfeit and pay the sum of seven dollars for every cask."

These are all the parts of the act, which are believed to have any bearing upon the question in what manner the word "condemned," shall be marked upon the cask, within the meaning of the statute.

It may be observed, that by the tenth section it is equally penal to export casks of flour not branded, as to export casks of flour "marked condemned," and therefore, it was not necessary that the word "condemned" should be branded on the cask; for whether branded or not, it could not affect the credit of the Virginia flour in a foreign market, because it was never to be exported. The tenth section does not say how the word "condemned" shall be marked on the cask; but it expressly provides that the degree of fineness of merchantable flour, shall be branded and marked; and if, upon appeal, flour, which the inspector shall have marked "condemned," should be determined to be merchantable, the inspector is to "erase out the word 'condemned,' and put such 'brand'" on the flour as the reviewers shall direct. The expression is not, such other brand, (which would have been used, if the legislature had intended, that the word 'condemned' should be branded on the cask,) but the expression used is "such brand as," implying that it had not been before branded and marked. The degree of fineness is to be branded and marked; the word condemned is to be marked. The same section makes it penal to export casks of flour, not inspected or branded as aforesaid. If the casks of flour should have been inspected and branded "condemned," they would not literally have been within this penalty, if the act had required the word "condemned" to be branded upon such casks. Hence it may be strongly inferred that the legislature did not intend that the word "condemned" should be marked by branding.

The eleventh section, surely, is not intended to guard against the mischief of packing flour in old casks marked "condemned;" yet it complains that evil disposed persons have packed flour "in old casks which have been branded agreeable to this act." If the word "condemned" was to be branded on the cask, it would be included in the expression "branded agreeable to this act," and therefore within the letter of the mischief complained of, although clearly not within its spirit. The legislature, therefore, in this section, seems to have considered the term "branded" as applicable only to the branding of merchantable flour.

This is believed to be the whole substance of the argument, on the part of the prosecution, upon this point; and if the question rested entirely upon the tenth and eleventh sections of the act, the Court would be clearly of opinion that the penalty for lading on board of a ship, for exportation out of the district, a

cask of flour marked "condemned" by an inspector, might be incurred, although it were so marked with red chalk, and not branded.

But the question does not rest on those two sections only. The whole act must be construed together, so as to be consistent in all its parts, if possible.

The tenth is the only section which requires that the word "condemned," should be marked upon casks of unmerchable flour. When the fifteenth section says, that "if any person" "after any cask of flour shall be branded 'condemned' shall unpack and re-pack the same in other casks for exportation, such person shall forfeit and pay the sum of seven dollars for every cask," it evidently refers to the marking of the word "condemned," required by the tenth, and renders that certain, which the tenth section left uncertain, to wit, the manner of marking the word "condemned."

It is evident that the legislature took it for granted that, under the tenth section, the word "condemned" was to be branded on the cask; and, upon the principles of construction applicable to penal laws, no person would be liable to the penalty of seven dollars a barrel, under the fifteenth section, for unpacking and repacking condemned flour in other casks, for exportation, unless the word "condemned" had been branded on the cask.

That the mode of marking was, by the tenth section, left to the discretion of the inspector, is only matter of inference; and we think that the inference, arising from the fifteenth section, is stronger than that arising from the tenth and eleventh sections. We think that the tenth and fifteenth sections must have the same construction, as to the mode of marking; and, if they conflict with each other, one must yield. But we do not think that there is any repugnance between them. One designates the mode; the other does not. The uncertain must be construed by the certain. This construction is corroborated by other sections of the act.

The sixth requires every miller of flour, for exportation, to provide and keep a distinguishable brand-mark, with which he shall brand every cask of flour, and mark thereon the tare and net weight; and inflicts a penalty for removing the casks not branded and marked, as aforesaid; but the persons removing the cask, and who may have paid the penalty, may recover it from the miller, if he shall have informed him of his intention to carry them, and requested him to brand the casks. He is not obliged to request the miller to brand and mark the casks, but only to brand; implying that the tare and net weight is to be marked by branding.

The thirteenth section contains the form of the inspector's oath, by which he swears not to pass or brand any flour without inspecting it. Here the word "brand" may be applied, as well to unmerchantable as to merchantable flour. He is not to pass, nor to brand as condemned, any flour without inspecting it. He further swears that he will not brand, as passed, any flour not merchantable; implying that the flour may be branded, and not passed. He also swears that he will mark, on all casks of flour, the degree thereof. Here the word "mark" is used for brand; for, by the tenth section, he is to brand and mark the degree of fineness.

Some stress was laid on the word "erase," in the tenth section, where it is said that, if flour which has been marked "condemned," should, upon appeal, be adjudged merchantable, the inspector shall "erase out" the word "condemned." It was said that the word "erase" was not the proper word to designate the obliteration of a brand-mark. But, in truth, it is the most proper word that could be used to express the idea. It is derived from the Latin word *rado*, which signifies to shave, to scrape, to make smooth. It is defined by Johnson, "to blot out by rasure;" and rasure is defined to be "the act of scraping, or shaving." Whatever argument, therefore, may be derived from the meaning of the word "erase," is against the construction which would permit the word "condemned" to be written with chalk; to the obliteration of which neither scraping nor shaving is necessary, as it is for that of a brand-mark.

Upon a comprehensive view of the whole act, we are still of the opinion which we expressed at the trial, that, unless the word "condemned" be branded on the cask, no person can be liable to the penalty, under the tenth section, for lading on board of a vessel, for exportation, flour marked "condemned;" nor to the penalty under the fifteenth section, for altering the inspector's mark.

Judgment for the defendant; but the Court ordered it to be certified that there was probable cause for the prosecution.

UNITED STATES v. WILLIS ANDERSON.

In 1827, manslaughter, in the District of Columbia, was punishable by fine and imprisonment.

THE prisoner was convicted of manslaughter, by killing Gerard Arnold.

Sentence, to pay a fine of \$300, and to be imprisoned one year, and until the fine and costs should be paid.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1827, AT WASHINGTON.

CATHERINE FOXALL *v.* MCKENNEY *et al.*

Coffee in a bag, wine in bottles, and brandy in a cask, laid in by the testator for the current use and consumption of himself and family, did not pass, under a bequest to the testator's wife, of "all his furniture, and other household effects, in both of his residences," "to be held and occupied by her, for her sole and separate use and benefit, provided she should continue to reside in either of the said residences, and for life, if she should so long continue to reside therein."

The bag, bottles, and cask go with their contents, as incidents thereto.

The words, "all my servants," were limited to house servants, by the intention of the testator, as gathered from other parts of the will.

A bequest of the use of the testator's "property" in a certain baking business, comprehends the use of the testator's servants employed therein.

THIS was a bill in equity, filed by Mrs. Foxall against the executors of her husband's will, and certain trustees under her marriage settlement, for certain provisions of coffee, wine, and brandy, which had been laid in by her husband for the current use and consumption of the family; and also to obtain the use of his servants, who had been employed in a baking business carried on under the superintendence of his son-in-law, Mr. McKenney; and to be reimbursed her travelling expenses from England, where her husband died, to the United States.

This cause was heard in this Court at the same time with the two causes of *Foxall v. English et al.*, and *English et al. v. Foxall*, which were decided by the Supreme Court of the United States, in 1820, (2 Peters, 595.) This cause, however, was not carried up.

The following opinion of the Court was delivered by CRANCH, C. J., (THRUSTON, J., absent.)

The third bill, namely, *Foxall v. McKenney et al.*, presents three questions:

1st. Who is entitled to the coffee, wine, &c., laid in by Mr. Foxall for household consumption?

2d. Are the trustees entitled to the use of the servants employed exclusively in the bakehouse?

3d. Is the plaintiff, Mrs. Foxall, entitled to be repaid by the defendants her travelling expenses from England to Georgetown?

1. As to the coffee, wine, &c. By the marriage settlement she was to have, for life, the dwelling-house and appurtenances in Georgetown, his "household goods, implements, and utensils of household, china, linen, family carriage, and pair of horses," then (4th November, 1816,) in his dwelling-house in Georgetown; and the trustees were to hold the same in trust; to permit Mrs. Foxall "to occupy and enjoy" the dwelling-house and appurtenances; and "to hold, use, and enjoy the said household furniture, implements, and utensils of household, china, linen, carriage, and horses, for and during the term of her natural life, if she shall so long continue to reside in the said dwelling-house, to and for her own sole and separate use and benefit;" and after her decease, or ceasing to reside therein, upon trust for Mrs. Foxall's executors, administrators, and assigns.

By the will, after confirming the marriage settlement, he bequeathed to his wife \$500, as a temporary "provision for her support, until the enjoyment of the provisions of the settlement should accrue to her." He also gives her, "for her own use absolutely," certain plate in the house at the time of his death. He also gives her the use of all his servants, during the remainder of their time of servitude. He also gives her a right to select either his town or country residence, "or to continue in the occupation and enjoyment of both, the same as they had been occupied and enjoyed by himself;" his "desire being to promote the personal comfort of his wife," and that the occupation by her, of both residences, should be as his had been. He declares that his book-case, and books therein, shall be considered as forming a part of the household furniture, limited to her by the settlement; "and if she shall choose to continue the occupation of both residences," he gives and bequeathes to her all his "furniture, and other household effects, in both residences, not included in said settlement, to be held, used, and enjoyed by her, in the same manner, and upon the same terms, and for the same time, as the furniture and other household effects included in the said settlement;" but if she shall choose Spring-Hill, (the summer residence,) instead of the house in town, he then gives her power "to take and remove such part of his furniture and other household effects in his town-house, and carry the same with her to Spring-Hill, to be held and enjoyed by her in the same manner, in every respect, as the furniture and other household goods in his said dwelling-house; and as to such part thereof as she should not remove to Spring-

Hill," he directs that the same shall sink into and form part of the "*residuum* of his estate."

At the time of Mr. Foxall's death, there remained in his dwelling-house in Georgetown a small quantity of coffee in a bag, and some wine in bottles, and brandy in a cask, the whole value of which was \$458.48, after deducting \$20.06 $\frac{1}{4}$ for the bottles, &c., which coffee, wine, and brandy had been laid in by Mr. Foxall for the current use and consumption of himself and family, and not for sale.

Mrs. Foxall, after her return from England, where her husband died in December, 1823, having determined to continue the occupation of both residences, (viz., the house in town and Spring-Hill,) took possession of the same and all the household effects in both, including the coffee, wine, and brandy; and the question now is, whether these family stores, or provisions, passed to her under the bequest of "all his furniture and other household effects in both residences, not included in the settlement; to be held, used, and enjoyed by her, in the same manner, and upon the same terms, and for the same time, as the furniture and other household effects included in the said settlement," that is, "for her sole and separate use and benefit," provided she continued to reside in either of the said houses, and for life if she should so long continue to reside therein.

The intention of the testator is the ruling principle of construction in expounding a will. If the words are, in their usual import, extensive enough to carry the thing in question, but may be so construed as not to carry it, the intention of the testator must be sought by a comprehensive view of the whole will, and the circumstances in which the testator was, at the time of making it.

The words, goods and chattels, are the most comprehensive terms of description for passing personal property by will; yet they may be restricted by the context. Thus in *Crichton v. Symes*, 3 Atk. 61, the words "all my goods, wearing apparel of what nature and kind soever, except my gold watch," were restricted to household goods and furniture, there having been a legacy of £50 given by the same will to another legatee; which showed the intention of the testator not to give every thing to the first legatee; it appearing also that the household goods, furniture, wearing apparel, and watch, together with the £50, constituted the whole personal estate, except about £16. And in *Woolcomb v. Woolcomb*, 3 P. Wms. 112, one devised to his wife "all his household goods, and other goods, plate, and stock, within doors and without," and bequeathed the residue of his personal estate to J. S. It was contended that the words "all

other goods," carried the whole personal estate; but the Lord Chancellor was of opinion that such a construction would make void the bequest of the residuum; and that it seemed reasonable that the words "other goods" should be understood to signify things of the like nature with household goods, "to the end the whole will might have its effect; and consequently that the money, cash, and bonds should not, in this case, pass by the word 'goods,' but should go to the residuary legatee."

In the case of *Pratt v. Jackson*, 2 P. Wms. 302, the words "household goods, utensils, and household stuff," in a marriage settlement, were held, by the House of Lords, upon appeal, to carry only such as were in the dwelling-house of the husband, who lived in London, and not the beds, &c. in a marine hospital in Portsmouth, where he provided for sick and disabled seamen, under a contract with the government; these beds, &c. being considered rather as stock in trade than household goods.

These cases, and many others which might be cited, show that words, which are, of themselves, large enough to include the thing in question, may, by their associates, or by the context, or other circumstances, be so far contracted as to exclude that thing; and they are all examples of the rule that "the intention of the testator is to govern the construction of the will."

In the present case, if the coffee, wine, and brandy were bequeathed to Mrs. Foxall, it must be because they are included in the expression "household effects."

These words do not seem to comprehend more than the words "household goods;" and they are used by the testator himself as equivalent terms; and in the marriage articles he has repeatedly used the words "household furniture" as equivalent to "household goods." By his will, he declares that his book-case and books therein shall be considered "as forming a part of the household furniture which is limited to" his wife by the settlement; and if she shall choose to continue the occupation of both residences, he gives her "all his furniture and other household effects, in both his said residences, not included in the settlement; to be held, used, and enjoyed by her, in the same manner, &c. as the said furniture and other household effects, included in said settlement."

The indiscriminate use which he makes of the expressions "household furniture," "household goods," and "household effects," seems clearly to prove that he considered them synonymous; and by limiting his wife to the use of the "household effects" bequeathed, in the same manner, upon the same terms, and for the same time, as the "household effects" included in

the settlement; it is strongly to be inferred that they were to be effects of the same kind.

It had been decided, nearly a century before the date of this will, by Lord Chancellor Talbot, in the case of *Stanning v. Style*, 3 P. Wms. 334, 335, that malt, hops, beer, and ale, "which are victuals, and whose use is in their consumption, cannot, in their common, natural sense, be taken to be household goods, and pass under that denomination." And the case is much stronger where the use of the household effects is limited to the life of the legatee. In a still earlier case, (Mich. 1729,) *Trafford v. Berrige*, 1 Eq. Ca. Ab. 201, ca. 14, it was holden that where a man devised to his niece "all his goods, chattels, household stuff, furniture, and other things, which then were or should be in his house at the time of his death, and some time after died, leaving about £265 in ready money in the house, this ready money did not pass; for, by the words 'other things,' shall be intended things of like nature and species with those before mentioned."

It is evident, by the various clauses of the will which have been cited, that it was the intention of the testator to give Mrs. Foxall those things only, of which there could be a use for life, and which might remain in specie at her death; and that such as would be consumed in their use were not in his contemplation; and therefore he could not intend to give them. And, although from the general tenor of the will, and the solicitude it manifests to provide for the personal comfort of his wife, we may suppose that if these household stores of coffee, wine, &c. had been the subject of his thoughts, he would probably have given them to her; yet as it seems manifest that he did not think of them, and that he has not, in his bequest, used such expressions as, according to settled rules of construction of wills, will comprehend them, I am compelled to say that they did not pass to her by the will.

I am also of opinion that the bag, the bottles, and the cask, go with the coffee, wine, and brandy, as incidents thereto.

2. The 2d question arising upon this bill, is, Whether the trustees are entitled to the use of the servants who had been exclusively employed in the bakehouse in the lifetime of the testator.

The clause of the will under which Mrs. Foxall claims them is in these words: "Also I give to her the use of all my servants during the remainder of their time of servitude."

After this and several other specific bequests and devises, and subject thereto, he bequeathes and devises, to his trustees, whom he also appoints his executors, all his property of every kind, with the most ample powers to manage the same. Then comes

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the following clause, under which the trustees claim the use of the bakehouse servants :

“ And whereas I am now carrying on the baking business, in Georgetown, under the care and superintendence of my said son-in-law, Samuel McKenney, who accounts to me,” &c., “ Now I do hereby declare my mind and intention to be that my said trustees do and shall, in their discretion, continue to carry on the said business after my death, for such time as they shall think it proper and prudent; and to use and employ my property therein, under the care and superintendence of the said Samuel McKenney, in the same manner as the same is now carried on by me and superintended by him,” &c. &c.

The servants in the bakehouse were literally Mr. Foxall's servants, and had a limited time to serve; and the words of the bequest to Mrs. Foxall are extensive enough to comprehend them, and she is entitled to the use of them, unless the general expression “all my servants” can be limited by the intention of the testator as discovered by a consideration of the other parts of the will. The 1st clause of the will confirms the marriage settlement; the 2d gives his wife \$500 in addition to the settlement; the 3d gives her certain articles of plate; the 4th gives her the use of the servants; the 5th gives her the use of both his residences. These provisions seem all to be made *in pari materia*, and to have had the same object — the personal comfort of Mrs. Foxall in the residences she was to continue to occupy as he had done. They all relate to the household establishment, and to the small farm at Spring-Hill, which she was to occupy as a “retreat merely.” For these purposes the bakehouse servants had not been used, and seem not to have been contemplated by the testator in the bequest, to his wife, of the use of his servants.

I think therefore that she is not entitled to the use of the bakehouse servants.

3. The 3d question, arising upon this bill, is, Whether Mrs. Foxall is entitled to be repaid, by the defendants, her travelling expenses from England to Georgetown.

I see no part of the will which justifies such a claim; and therefore am of opinion that it cannot be allowed.

MORSELL, J., concurred.

REYNOLDS, Administrator of Hunt, v. CALVERT.

After the cause of action was barred by the Act of Limitations, the defendant said he received the things, but paid for them by a check on the Bank of Washington, and referred the witness to the teller of the bank. Held, not sufficient to take the case out of the Statute.

ASSUMPSIT, for goods sold and delivered. The defendant

Reiling v. Bolier.

pleaded the statute of limitations. At the trial of the issue joined on that plea, the plaintiff offered evidence that the defendant said that he received the goods, but paid for them by a check on the Bank of Washington, and referred the witness to the teller of that bank.

Mr. Wallach, for the defendant, prayed the Court to instruct the jury, that the said evidence was not sufficient to take the case out of the statute; and cited *Clementson v. Williams*, 8 Cranch, 72; *Fries v. Boisselet*, 9 Serg. & R. 128; *Starkie*, part 4, p. 895.

Mr. Scott, contra. When a defendant says he has paid in a certain way, and fails to prove the payment in that way, it is sufficient to take the case out of the statute. The statute is founded upon presumption. *Starkie*, part 4, p. 896; *Greenleaf*, 152; *Trueman v. Long*, 2 Haywood, 13.

Mr. Wallach, in reply. The burden of proof is not on the defendant to show payment. *Beale v. Nind*, 4 B. & A. 568; *Helings v. Shaw*, 7 Taunt. 608, 612; *Dean v. Pitts*, 10 Johns. 35.

Mr. Scott also cited *Davis v. Berdier*, 1 McCord, 320; and *White v. Potter*, 1 Coxe, 159.

The COURT gave the instruction, (*nem. con.*)

The jury found a verdict for the plaintiff.

The COURT granted a new trial, *instanter*.

 THORNTON v. CORPORATION OF WASHINGTON.

No appeal lies from the judgment of a justice of the peace, unless the "debt or demand" exceed the sum of five dollars.

APPEAL from the judgment of a justice of the peace for a penalty of five dollars, for not registering a dog, according to the by-law of the Corporation of Washington, of 1st of April, 1820, § 2, Burch's Dig. 83.

The appeal was dismissed by the Court without costs, (*nem. con.*) no appeal being given by the seventh section of the Act of Congress, unless "the debt or demand doth exceed the sum of five dollars."

 REILING v. BOLIER.

A judgment by default, and writ of inquiry, in the county of Washington, may be set aside at the next term, upon affidavit of merits, payment of costs, pleading to issue to the merits *instanter*, and offering ready for trial.

MOTION by *Mr. C. C. Lee* and *Mr. Jones*, for the defendant, to

set aside an interlocutory judgment by default, and quash the writ of inquiry; upon affidavit of merits, payment of costs, pleading to issue of the merits instanter, and offering ready for trial. Tidd, 507, 508.

The COURT, (MORSELL, J., doubting,) after examining the decisions of this Court, and not finding any directly to the point, where the judgment was interlocutory and writ of inquiry awarded, granted the prayer of the defendant's counsel upon the terms offered. This would have been the regular trial-term if the pleas had been regularly filed.

The cases examined by the court, were *McCleod v. Gloyd*, (2 Cranch, C. C. 264); *Ault v. Elliot*, special bail of Mortè, at April term, 1823, (Id. 372); *Ringgold v. Elliot*, at April term, 1824, (Id. 462); *Williamson v. Bryan*, at April term, 1823, (Id. 407); *French v. Venable*, at December term, (Id. 509); *Union Bank v. Crittenden*, at April term, 1821, (Id. 238); *McCormick v. Magruder*, at April term, 1821, (Id. 227); *Sherburne v. King & Langley*, at June term, 1820, (Id. 205); *Jones v. Llewellyn*, at December term, 1819, and March, 1820, not reported. See also 2 Har. Ent. 88, 121; *Goldsworth v. Southcott*, 1 Wils. 243; and 2 Saund. 7, note 3.

Trial and verdict for plaintiff, \$120.

BANK OF UNITED STATES v. JAMES C. WILSON.

The defendant had settled his account with the plaintiffs, and paid the balance then claimed. The plaintiffs afterwards changed the entries in their books, so as to show a balance still due to the plaintiffs, and presented him an account thus stated, which the defendant refused to admit or receive as a true statement of his account, but received it only as containing the then aspect of the plaintiff's books. The Court refused to compel the defendant to produce that account, at the trial, unless accompanied by the defendant's affidavit of those facts.

Payment of a check, by the bank upon which it is drawn, is *prima facie* evidence of funds; especially when the checks have been surrendered to the drawer.

NOTICE had been given by the plaintiffs to the defendant, to produce his bank-book at the trial. The defendant made affidavit that no bank-book was kept for him, during the transactions; and that he paid the balance demanded of him by the bank. He admits that several years subsequently, changes were made in the entries, in the books of the bank, whereby a balance was made to appear against the defendant; that a statement of the accounts as then appearing, was tendered to the defendant, which he utterly refused to admit or receive, as a true statement

Negro Richard v. Van Meter.

of his account, and never did receive the same as such; but received it only, as containing the then present aspect of the books of the bank, and expressly denying that he owed a cent to the bank.

The COURT ordered the account to be produced, but to be accompanied, if used in evidence, by the defendant's affidavit.

The defendant then demurred to the plaintiff's evidence, and the plaintiffs joined in demurrer.

The plaintiffs read in evidence, to the jury, the checks drawn by the defendant on the plaintiffs, and by them paid; which checks had been cancelled by the bank, and delivered up to the defendant, upon the settlement of the account; and which had been produced by the defendant upon notice. The plaintiffs also produced evidence that it was the general practice of the bank, not to pay checks without funds; but that, sometimes, customers overdraw, and their checks were paid without funds.

Mr. C. Cox, for the defendant, contended that acceptance of a bill or draft, is an admission of funds, *primâ facie*; and especially when the draft is surrendered. He cited *Vere v. Lewis*, 3 T. R. 182; *Chitty on Bills*, 469, 470, 524.

Mr. Lear, *contra*, cited *Tatlock v. Harris*, 3 T. R. 174.

The COURT rendered judgment for the defendant, upon the demurrer to the evidence, at May term, 1827.

NEGRO RICHARD v. ABRAHAM VAN METER.

An attachment of contempt will lie against a master who attempts to remove his slave out of the jurisdiction of the Court after he has notice or knowledge of the slave's petition for freedom; and the Court will also order the slave to be brought into court by the marshal, that he may be protected.

A contract between a master and his slave cannot be enforced either at law or in equity.

THIS was a petition for freedom, stating in general terms, that the petitioner is entitled to his freedom, but is held in slavery by the defendant. It was filed on the 3d of April, 1826.

On the 31st of May, 1827, the petitioner filed an additional petition stating that he had filed his petition for freedom, which was still pending, of which the defendant's agent, (Miller,) has been duly notified, as well as the defendant, Van Meter, himself, who has seized upon the petitioner, and threatens to remove him from the jurisdiction of this Court, before his suit can be tried, and praying the protection of the Court, and for general relief. This was sworn to, by John B. Gray, a white man. Where-

Negro Richard v. Van Meter.

upon, the following order was made by the COURT, (CRANCH, C. J., doubting.)

“Ordered, that an attachment issue against the said Van Meter, for a contempt of this Court, in forcibly seizing, and attempting to carry the petitioner out of the jurisdiction of this Court, after due notice of the pendency of the said petition; and that the petitioner be brought before this Court, in order that proper measures may be taken to protect him from further violence, and unlawful hindrance in the prosecution of his suit for freedom.”

Being brought into court, Mr. Van Meter, upon interrogatories, purged himself of the contempt; and filed an answer to the petition.

The cause was tried by the Court, neither party having required a trial by jury, as provided for in the twenty-second section of the Maryland Act of 1796, ch. 67.

CRANCH, C. J., delivered the judgment of the Court, as follows, (THRUSTON, J., dissenting.)

This cause has been tried before the Court, by consent, without a jury. The facts appear to be, that the plaintiff was the slave of William W. Claggett, who, on the 25th of June, 1822, gave him the following written certificate:

“This is to certify that Richard, my negro, wishes to purchase himself, and it is my wish that he should do so; therefore, he is at liberty to work for himself, so as he may be able to accomplish his object. Upon his finally paying one hundred dollars he then is to be free. Given under my hand this 25th of June, 1822.

William W. Claggett.

On the 6th of December, 1822, Mr. Claggett sold him to Daniel Bussard, by bill of sale of that date, “as a slave for life.”

There is no evidence that Mr. Bussard ever saw Mr. Claggett's certificate until after he bought him, although there is some reason to believe, that he knew, that the negro had received some such promise.

It is probable that some part of the 100 dollars was paid by Richard to Mr. Claggett; but how much, is uncertain. Mr. Walter Claggett has testified, that he heard his brother, William W. Claggett, say, that about thirty-five dollars were due, and that when that sum was paid, Richard was to be free. There is no evidence that Mr. Van Meter had any knowledge, at the time of his purchase of the negro, that he had any promise of freedom.

These appear to be all the material facts of the case. The claim rests upon a conditional promise made by the master to his slave. In the case of *Negro Joseph Brown v. Wingard*, this Court in April, 1822, (2 Cranch, C. C. 300,) decided that a contract between a master and his slave, could not be enforced at law or in equity. That decision has been adhered to ever

 Jenkins v. Calvert.

since, and seems to be decisive of the present case, even if the whole purchase-money had been paid.

We think the judgment must be against the petitioner.

THE BANK OF COLUMBIA v. WRIGHT.

By the law of Maryland, witnesses can be permitted to testify upon affirmation, only when they are members of some religious society who profess to be conscientiously scrupulous of taking an oath.

MR. DANIEL KURTZ, being called as a witness for the plaintiffs, objected to taking the usual oath ; and said he held the doctrine of the Society of Friends upon that point; but could not say he was a member of that society, but he generally worshipped with them.

The defendant's counsel, *Mr. Jones*, objected to his giving testimony, otherwise than upon oath. He cannot be permitted to testify upon affirmation, unless he is a member of some society who hold it unlawful to take an oath. Such has been the construction of the law in Maryland. He cited the Bill of Rights of Maryland, § 36, and the Maryland Act, 1797, c. 118.

Mr. J. Dunlop, contra. The Judiciary Act of the United States, § 30, [1 Stat. at Large, 73,] authorizes witnesses to be sworn or affirmed. There is no law of the United States, which directs in what cases they shall be sworn, and in what they may affirm.

The COURT (*nem. con.*) said they felt bound by the decisions of the Maryland courts upon that statute, (1797, c. 118.) The witness cannot be permitted to testify on affirmation, unless he is a member of a society who profess to be conscientiously scrupulous of taking an oath.

The parties agreed to continue the cause, to give time to apply to Congress, to amend the law on that subject.

JOHN JENKINS v. EDWARD H. CALVERT.

Goods fraudulently removed by the tenant, although not secretly or clandestinely, may be followed and distrained by the landlord.

The tenant's removal of his goods before the expiration of the term, without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the landlord.

A receipt for the last year's rent, is evidence that the rent for the preceding years has been paid.

REPLEVIN. *Mr. Key*, for the plaintiff, prayed the Court to in-

Denny v. Queen.

struct the jury, that if, &c. "the tenant removed the goods from the premises in the day-time, openly, and with the knowledge of the neighborhood, then the defendant could not follow and distrain the goods, and the plaintiff is entitled to recover."

Which instruction the Court refused to give, (MORSELL, J., dissenting.)

Mr. Key then made the same prayer, with this addition, "unless the defendant shall prove to the satisfaction of the jury, that the removal was fraudulently intended to prevent the landlord from distraining. And the circumstance of the landlord's not being apprised of the day of such intended removal, is not a circumstance from which the jury may infer such fraud."

Which instruction the Court also refused to give, (MORSELL, J., dissenting.)

Mr. Key then prayed the Court to instruct the jury, that if, &c. the rent of 1825 was paid, and a receipt therefor given by the landlord, they ought to presume that the rents of the preceding years were paid also, unless the defendant should show that they were not paid.

Which instruction the Court gave *nem. con.*

 DENNY v. QUEEN.

In a jury trial before a justice of the peace, there is no mode in which the law of the case can be brought before this Court, separated from the question of fact.

APPEAL from the judgment of a justice of the peace, upon a verdict found before him.

A paper was sent up, purporting to be a prayer to instruct the jury as to the law arising upon certain facts therein stated. It was not certified as a bill of exceptions.

The Court (*nem. con.*) said that as the Court had heretofore decided, that when a cause had been tried by a jury before a justice of the peace, we could not constitutionally try the cause again by a jury in this Court, and the Court could not try it without a jury, there was not left, for this Court, upon the appeal, any thing but the law of the case, as it appeared before the justice; but the act has not prescribed the mode by which the question of law should be made to appear to this Court. It certainly was not now regularly before the Court.

The Court (*nem. con.*) ordered the appeal to be dismissed.

Union Bank of Georgetown v. Forrest.

THE UNION BANK OF GEORGETOWN v. GEO. P. FORREST *et al.*

The condition of a teller's bond "faithfully to perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness, or want of care," comprehends damages arising from his want of care, as well as from his unfaithfulness.

The words "six months" in the 4th section of the Act of Congress of the 2d of March, 1821, "to extend the charters of certain banks in the District of Columbia," mean six calendar months.

The teller's bond, executed under the original charter, covered defalcations arising under the extended charter; and after the time when the charter would have expired but for such extension.

It was not necessary that the teller should be appointed yearly, and from year to year; and an interval of three days, during which the teller continued to act as such without being reappointed, did not destroy the plaintiff's right of action upon the bond, for damage incurred after such interval, by the teller's want of care.

Under the condition of this bond, the defendants are bound to save the plaintiffs from all loss arising from any want of care of the teller, if by any degree of care on the part of the teller it might have been avoided.

The neglect of the cashier to settle the daily accounts of the teller according to the by-law of the bank does not discharge the sureties.

The usage of other banks requiring only reasonable care and diligence, cannot affect the express condition of the bond.

DEBT on the teller's official bond, against George P. Forrest, the teller of the plaintiff's bank, and Washington Bowie and Nathan Lufborough, his sureties.

The condition of the bond was, "That whereas the said George P. Forrest has been appointed to the office of teller in the said bank: Now, if the said George P. Forrest shall faithfully perform all the duties assigned him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care, then this obligation shall be void, otherwise to be and remain in full force. It is understood that the teller is appointed, or elected from year to year, and that this obligation shall continue in force so long as the said George P. Forrest shall act as teller in said bank."

The breach assigned in the declaration was, the not making good to the plaintiffs the sum of \$1,893.76, being the damages which the plaintiffs aver they have sustained by reason of the teller's want of care in performing the duty assigned him of accounting for and paying over to the plaintiffs the moneys which came into his hands as teller between the 16th of November, 1818, and the 23d of January, 1822.

There were seven pleas. Issue was joined on the 1st, 2d, and 5th, and demurrers to the 3d, 4th, 6th, and 7th.

The 3d plea averred that the said G. P. Forrest did, during the time of his continuance in the said office of teller, faithfully perform the duty of accounting for and paying over to the plaintiffs, all the moneys put into his hands as teller, "without this

that the said George P. Forrest failed to account for and pay over the said sum of \$1,893.76, in the said declaration mentioned, through, or by reason of any unfaithfulness, dishonesty, evil design, purpose, or intent of the said George P. Forrest in the performance of the duties assigned him as aforesaid; and this the said defendant is ready to verify," &c.

The 4th plea averred that the said G. P. F. did, during, &c. "faithfully perform the duty of accounting for and paying over to the plaintiffs, all the moneys put into his hands as such teller. But the said defendant, admitting that in the course of accounting as aforesaid, the said sum of \$1,893.76, of the moneys put into his hands, as such teller as aforesaid, did appear to be unaccounted for and unpaid by him to the plaintiffs, and was not accounted for and paid over to the plaintiffs, yet the defendant says that the said failure so to account for and pay over the said sum of money, did not arise from any unfaithfulness, dishonesty, evil intent, design, or purpose of the said G. P. Forrest, in performance of the said duty, to account for and pay over, to the plaintiffs, the moneys put into his hands as teller, in manner and form, as the plaintiffs have complained, &c. and this he is ready to verify," &c.

The 6th plea averred, "that during the time, &c. it was by the president and directors of the said bank, made the stated duty of the said G. P. F. as teller, to receive from the customers of the said bank, payments and deposits of money in the same, and to pay out to the bearers of checks upon the said bank, the amount of such checks, out of certain moneys of the said bank therein kept for that purpose by the said G. P. Forrest, during the usual hours of business in the said bank, viz. from 9. A. M. to 3 P. M., and on the closing of the bank from day to day, to account with the cashier of the said bank, for all moneys received by him, the said G. P. F., as teller, in the course of such day, and for all moneys paid out by him, as teller, upon checks; and upon such accounting from day to day to count over the said money so kept in the said bank, under the care and custody of the said G. P. F. as aforesaid, or the balance remaining of the same, together with the moneys received by him as teller, in the course of each day, as aforesaid, after deducting from the same all moneys paid out upon checks by him, as such teller, in the course of each day, as aforesaid; and to leave, under the exclusive care and custody of the said cashier thereof, at the closing of the said bank for each day as aforesaid, the entire balance of the said moneys so counted and remaining as aforesaid, without the said G. P. F.'s having any care or custody of the said moneys, or any concern with, or any responsibility for the same, after the

closing of the said bank as aforesaid, until the opening of the same on the next succeeding morning. And the said defendant, in fact, says, that the said G. P. F. did daily, and from day to day, during, &c. at the closing of the bank on each day, as aforesaid, faithfully account with said cashier, for all of the said moneys as aforesaid, and faithfully turn over to the said cashier, and leave in the said bank, under his exclusive custody and care, the entire balance which appeared upon such daily counting and accounting as aforesaid, and was then and there found by the said cashier to be remaining of the said moneys as aforesaid; and upon such accounting for, counting, and turning over of the said moneys to the said cashier daily, and from day to day as aforesaid, the said cashier daily, and from day to day as aforesaid was satisfied with, and accepted as just and satisfactory, the daily accountings, settlements, and turnings over of the said moneys by the said G. P. F. as aforesaid; and the said defendant in fact says, that the said daily accountings, settlements, and turnings over of the said moneys were honestly and faithfully made by the said G. P. Forrest in all things on his part and behalf to be therein done and performed, in the faithful discharge, by the said G. P. F. as such teller as aforesaid of his duties as such teller.

Without this, that any sum or sums of money, the property of the said plaintiffs, during the time and times aforesaid, came or were put into the hands of the said G. P. F., in any other manner, or for any other purpose, than as hereinbefore mentioned, and set forth, and this the said defendant is ready to verify, &c.

To this plea there was a special demurrer for duplicity.

The 7th plea was pleaded by Mr. Lufborough, one of the sureties, for himself alone, and averred, that before the commencement of the plaintiffs action aforesaid, viz. on the 4th of March, 1821, the Act of Congress, entitled "An Act to incorporate the Union Bank of Georgetown," had expired by its own limitation, without the president and directors of the said bank having filed, at any time within six months from the passage of the Act of Congress of the 2d of March, 1821, [3 Stat. at Large, 618,] "to extend the charters of certain banks in the District of Columbia," their declaration in writing, assenting to and accepting the extension of their charter, under the terms, conditions, and limitations contained in the said act; and without having complied with the condition contained in the 4th section of the act, whereby the corporate body created by the name of "The President and Directors of the Union Bank of Georgetown," who are the plaintiffs in this action, was, on the 4th of March,

1821, and before the commencement of this suit, dissolved, and utterly extinct.

To this plea, the plaintiffs replied, in substance, that they did, on the 21st August, 1821, comply with, and accept the terms of the Act of the 2d of March, 1821, extending their charter.

The defendant rejoined that the 21st of August was more than six months after the passage of the Act of the 2d of March, 1821, and so not within the time limited for the acceptance of the extension of the charter.

To this rejoinder the plaintiffs demurred.

To the third and fourth pleas the demurrer was general.

Mr. J. Dunlop, for the plaintiffs. 'These two pleas rely upon the ground, that fidelity alone is an answer to loss by want of care. Upon this point he was stopped by the Court.

As to the sixth plea, he said it does not answer the allegation of damage by the want of care. An honest account is not sufficient; nor is the cashier's acquittance. This plea does not state that the teller paid over all moneys which he was bound to pay, but only the money which remained in his hands. The declaration is sufficiently explicit; it is not necessary to set out in the declaration the particular sums which make up the aggregate amount lost by the teller's negligence. 1 Chitty, 512, 513, 520, 523, 624; *Barton v. Webb*, 8 T. R. 459; 2 Chitty, 622; *Shum v. Farrington*, 1 B. & P. 640; 1 Tidd, 618, as to duplicity in pleading.

Mr. Jones, contra. The condition consists of two branches: fidelity and care. The declaration states no breach of duty, which is not answered by fidelity. A simple failure to account for money is the only breach whereby the plaintiffs sustained damage to the amount of \$1,893.76, through the want of care of the teller in performing the duty so assigned to him, that is, accounting.

The sixth plea states a special performance, — a special accounting. The demurrer brings before the Court the sufficiency of the inducement. The plea is not double, nor is it bad because the traverse is special. Stevens on Pleading, 188.

Mr. Key, in reply. The defendant had a right to stipulate against inevitable casualties, as well as against his dishonesty. He has bound himself to make good all loss which the plaintiffs might sustain by his want of care. Fidelity is no answer to this. The breach assigned in the declaration is, that he did not make good the damage which the plaintiffs sustained by his not paying out, or repaying the money he received. The manner in which the loss happened is mere inducement. It was not by not accounting, but by not paying.

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The sixth plea is liable to the same objection as the third and fourth, that is, that it does not answer the breach assigned.

If the first part, that is, accounting satisfactorily to the cashier, be a defence, the residue of the plea makes it double. If it be not of itself a defence, it is not aided by the residue. The duty of the defendant, as averred in his plea, was to repay to the cashier, every night, the money he received in the morning, except what he should have correctly paid out in the course of the day. But the averment of the performance is, that he repaid to the cashier what remained in his hands.

The COURT, (*nem. con.*) on the 7th of June, 1827, rendered judgment for the plaintiffs upon the demurrers to the third, fourth, and sixth pleas.

The seventh plea was not filed until the subsequent term, namely, December 17, 1827. The question arising upon the demurrer to the rejoinder to the replication to this plea was, whether the six months given to the bank, in which to accept or reject the extension of their charter, by the Act of the 2d of March, 1821, were lunar months or calendar months. If calendar months, the acceptance was in due time; if lunar, it was not, and the charter had expired. From the 2d of March to 21st of August is 172 days; six lunar months, of four weeks each, is 168 days only.

The question arose out of the fourth section of the Act of Congress of the 2d of March, 1821, c. 18, [3 Stat. at Large, 618,] entitled "An Act to extend the charters of certain banks in the District of Columbia;" by which it is enacted, "That unless the president and directors, for the time being, of each of the banks respectively whose charters are hereby extended, shall, on on behalf of their stockholders, and in virtue of an authority from them, or a majority in interest and number of them, file their declaration, in writing, in the office of the Secretary of the Treasury, within six months from the passage of this act, assenting to and accepting the extension of the charter hereby granted, under the terms, conditions, and limitations contained in this act, such bank shall forfeit all title to such extension of charter."

Mr. J. Dunlop, for the plaintiffs. In the case of *Lacon v. Hooper et al.* 6 T. R. 224, Lord Kenyon regretted that the old decisions obliged him to say that it must be understood to be lunar months. This was upon an Act of Parliament giving premiums to certain vessels who should remain out upon fishing voyages, in certain high latitudes, for a time not less than fourteen months from their clearing out. But the Act of Congress, extending the plaintiffs' charter, is upon a mercantile sub-

ject; and even in England, in a statute upon such subjects, the computation is by calendar months. 2 Bl. Com. c. 9, p. 141, Christian's note. So in ecclesiastical cases, respecting presentations, because the Church calculates by calendar months; and one reason given by Lord Coke is, that it may support right. *Catesby's case*, 6 Co. 62.

In Maryland, from the year 1715 to the year 1779, the six months for the enrolment of deeds had been considered as calendar months, as appears by the preamble to the Act of November, 1779, c. 10, which was enacted to remove the doubts which had "arisen in some of the courts of justice" in that State; and declares, "that in all cases where the enrolment of deeds is directed by law to be made within six months from the day of the date of the same deeds, the said months shall be deemed and taken, and are hereby declared to be calendar months." The same mode of computation prevails in Pennsylvania. In New York, however, the computation is by lunar months. But in South Carolina, Massachusetts, Kentucky, and Tennessee, the computation is by calendar months. Starkie, Part 4, p. 1398, note; 2 Mass. Rep. 170, note; *Avery v. Pixley*, 4 Mass. Rep. 460; *Brudenell v. Vaux*, 2 Dall. 302; *Commonwealth v. Chambre*, 4 Dall. 143; *Loring v. Halling*, 15 Johns. 119; *Stackhouse v. Halsey*, 3 Johns. Ch. R. 74.

Mr. Worthington, contra. The meaning of the word "month," at the common law, has been settled by a long course of judicial decisions, from the earliest times. 2 Bl. Com. c. 9, p. 141; *Tullett v. Linfield*, 3 Burr. 1455; *Lacon v. Hooper*, 6 T. R. 224; *The King v. Adderley*, Doug. 463; *Talbot v. Linfield*, 1 W. Bl. 450.

This is the general rule; the other cases are exceptions. *Catesby's case* rests on the word "half-yearly." So in the cases where the word quarterly is used. *Leffingwell v. White*, 1 Johns. Cas. 100; *Jackson v. Clark*, 7 Johns. 217; *Biddulph v. St. John*, 2 Sch. & Lef. 521; *Rex v. Bellamy*, 1 B. & C. 500.

In Pennsylvania, the court decided upon the phraseology of the statute.

In acts of Congress, generally, the legislature has distinguished and expressly mentioned calendar months, when they meant calendar months; as in the Collection Act of March 2, 1799, § 75, [1 Stat. at Large, 627,] the Act of April 20, 1818, c. 124, §§ 1, 2, 3, [3 Stat. at Large, 466,] the Act of April 10, 1816, § 3, [3 Stat. at Large, 266,] incorporating the Bank of the United States; and the original charter of the plaintiffs' bank, February 18, 1811, § 4, [2 Stat. at Large, 636.]

Mr. Jones on the same side. The Act of 1779 confines the

construction to the old Act of Enrolment of 1715. There is in law no lunar year. Parts of a year, such as a half or a quarter, mean parts of a solar year. The subject-matter of the statute cannot control the general rule. *Catesby's case* depended upon the words *tempus semestre*, which, says Lord Coke, "being spoken in the singular number, (as it appears by the dictionaries,) signifies half a year, or six months, namely, such six months as make half a year; and there is a great difference in our ordinary speech between the singular number, as a twelve-month includes all the year, according to the calendar; but twelve months shall be reckoned according to twenty-eight days to each month." Another reason for the judgment in *Catesby's case*, as stated by Coke, is, that "*verba accipienda sunt secundum subjectam materiam*"; and because this computation of months concerns those of the church, there is great reason that the computation should be according to the computation of the church, which they best know."

If this new charter had spoken of months in relation to the discount of notes, &c., there might be some ground for the exception. But this language is not applied to a mercantile act, and has nothing to do with the law-merchant. Congress, in legislating upon commercial subjects and mercantile persons, still use the word calendar, when they mean calendar months; leaving the inference that "month" alone means lunar month.

Mr. Key, in reply. This is an American act of Congress, legislating for this District as a substituted legislature for that of the State of Maryland. It is true that, in an English act of Parliament, the word "month" means, generally, a lunar month; but that is no reason why the same construction should be given to an act of Congress, there being no common law of the United States. Under a Maryland statute, the computation would be by calendar months; as in the case of *supersedeas* under the Act of 1791, c. 67, § 1, where the two months and the six months have always been construed to mean calendar months. So also in the Statute of Enrolment of Deeds; so also in the charter of the Bank of Columbia, &c.

If the construction be doubtful, it ought to be against a forfeiture, and in affirmance of the right. One of the reasons for the judgment of the court, as stated by Lord Coke, 6 Co. 62 a, is, that "when the computation is doubtful, it is good to determine it for the relief and remedy of him who hath right, and, for the advantage of right, to give him the longest time, to the end that he lose not his right."

The COURT (*nem. con.*) was of opinion that the legislature meant to give the bank six calendar months to file their accept-

ance of the extension of their charter; and CRANCH, C. J., in delivering the judgment of the Court, observed, that it is probable that the common law construction of the word months, as meaning lunar months, was never adopted in Maryland, and that it seemed to be quite obsolete, in regard to the common business of life, in this country; that the act of Congress is addressed to bankers, mercantile men, who always compute by calendar months; and that it is probable that the legislature intended to allow the same kind of months as they had mentioned in the original charter.

Upon this demurrer the Court rendered judgment for the plaintiffs.

Upon the trial of the issues, after the plaintiffs had given in evidence the teller's bond, and proved the deficit of his accounts to the amount of _____, and the acceptance of the extension of the charter,

Mr. Jones, for the defendant, moved the Court to instruct the jury that the plaintiffs could not recover upon that evidence; and contended that the bond, being given under the original charter, did not cover any defalcations occurring under the extended charter; and that it was necessary to prove the appointment of the teller by the acts of the President and Directors.

But the COURT (*nem. con.*) refused to give the instruction; being of opinion that there was sufficient evidence of the acceptance of the extension of the charter, under the Acts of May 4, 1820, and March 2, 1821, and that the condition of the bond extended to defalcations occurring in January, 1822; and that the Union Bank, in 1822, was the same Union Bank which existed at the date of the bond.

The COURT permitted evidence to be given by the defendant, to show that there might be an apparent balance against the defendant, and yet the plaintiffs not damnified; it being possible that such apparent balance might arise from error in accounting, and not in the actual transaction.

Mr Jones, for the defendant, then prayed the Court to instruct the jury, in effect, that the appointment of teller must have been from year to year, and that an interval of three days between the end of one year and his reappointment for the next year, (during which three days however he continued to act as teller,) destroyed the right of the plaintiffs to recover upon the bond for damage incurred, after such interval, by the want of care of the defendant; and also that the obligation of the bond ceased on the 4th of March, 1821, the day on which the charter of the bank would have expired if it had not been extended by the Acts of 1820 and 1821.

But the COURT (*nem. con.*) refused to give the said instruction.

Mr. Key, for the plaintiffs, then moved the Court to instruct the jury that the defendants are bound under their contract with the plaintiffs contained in the said bond, to save them from all loss arising from any want of care of the said teller; and that if mistakes were made by the said teller, in his business as teller, by which the said money was lost, and which loss, by any degree of care on the part of the said teller, in his office, could have been avoided, the defendants are liable therefor on the said bond.

Mr Jones, contra. The degree of care is not stated in the bond. It means reasonable care; such as a prudent man would use in his own affairs; such as a bailee for hire is bound to use.

Mr. Worthington, on the same side, cited the following authorities, as to the obligation of a bailee for hire. *Finucane v. Small*, 1 Esp. Rep. 315; 1 Gow, Rep. 30; Peake's N. P. C. 114.

The COURT, (*MORSELL, J.*, doubting,) gave the instruction as prayed, observing that in the cases of bailment, the parties are supposed not to have made any express contract as to the extent of the liability of the bailee, and therefore the law fixes his liability for him. But here the parties have entered into an express contract upon the subject; and the court can only construe that contract according to its legal force and effect.

To this instruction the defendant's counsel took a bill of exceptions, which stated that the defendant objected to the instruction, "understanding it to be intended so to construe the bond as to exact of the defendant a kind and degree of care, beyond the reasonable and proper care which a prudent, cautious, and careful man would have exerted, or should be presumed to exert in his own affairs in the like case; and therefore the defendants requested the Court so to modify the instruction requested by the plaintiffs, as to have it understood by the jury that a neglect of no other or higher kind or degree of care than the ordinary and reasonable care which a prudent, cautious, and careful man would have exerted, or should be presumed to exert, in his own affairs, in the like case, could be imputed to the defendants in this action, in so far as the plaintiffs seek to charge them for a loss occasioned by want of care. But the Court, being of opinion that the condition of the bond stipulated for a different and higher degree of care than the ordinary care required of agents, clerks, or bailees, who have not expressly contracted to be liable for want of care, therefore gave the instruction requested by the plaintiffs as above, without modification; and rejected the modification proposed by the defendants as above, to which also the defendants excepted.

Mr. Jones then prayed the court to instruct the jury in effect, that the neglect of the cashier to settle the daily accounts of the teller, whereby the risk of error was increased, discharged the sureties in this bond. *United States v. Van Zandt*, 11 Wheat. 187; *The People v. Janson*, Johns.

Mr. Key, contra, cited *The United States v. Kirkpatrick*, 9 Wheat. 720, and *The United States v. Nicholl*, 12 Wheat. 509.

The COURT (*nem. con.*) refused to give the instruction. *Mr. Jones* then moved the Court to instruct the jury, "that if they find from the evidence that according to general bank usage, no other or higher kind or degree of care was required of tellers or other bank officers, in the transaction of the bank business, than what a prudent, cautious, and careful man would exert in his own affairs, and in the like case; and that the plaintiffs themselves had, for several years before the claim was set up by them in this case, tolerated and accepted of the said Forrest without complaint, a discharge of his duty as teller, with no other or higher kind or degree of care than as aforesaid; then it is competent for the jury to presume that the plaintiffs dispensed the said Forrest and his sureties from any other or higher kind and degree of care than as aforesaid; and in such case the plaintiffs are not entitled to recover in this action, any loss, as for the want of care of the said Forrest; unless they prove to the satisfaction of the jury that he failed in the instance complained of, in such reasonable and proper care as a prudent, cautious, and careful man would have exerted, or should be presumed to exert, in the like case."

But the COURT (*nem. con.*) refused the instruction, because the evidence, as they thought, did not warrant the jury in inferring such usage, or such toleration; and because such usage, if proved in regard to banks who have not taken security against damage sustained by "want of care" of the teller, would not control the express stipulation to indemnify a bank for such damage, and because the instruction prayed would throw the burden of proof of negligence upon the plaintiffs, the bank, after they had shown that he had received money which he had not accounted for.

Verdict for the defendants; motion for new trial overruled; judgment for the defendants.

BRENT v. VENABLE.

The complainant in equity may file exceptions to the defendant's answer, although two months have expired after the answer was put in; if the defendant has not left a rule to reply with the clerk of the Court.

In equity, a question arose whether the complainant's excep-

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tions to the defendant's answer were filed in due time, and should be received. They were filed more than two months after the answer was put in; but before the defendant had left a rule to reply, with the clerk of the court, according to the 13th rule of practice established by the Supreme Court of the United States, for the Circuit Courts, which is as follows:

"Rule 13. The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply, with the clerk of the court, which being expired, and no replications or exceptions filed, the suit may be dismissed with costs; but the court may, for cause, order the same to be retained, on payment of costs."

"Rule 17. Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office."

The COURT (MORSELL, J., *contrà*,) was of opinion that the exceptions were filed in time, and ought to be received.



BANK OF THE UNITED STATES v. RICHMOND JOHNSON.

Upon trial before a jury in an action at law, the report of the auditor to whom the cause had been referred, under the Maryland Act of 1785, c. 80, § 12, to state the accounts of the parties, is *prima facie* evidence of the balance due, if the principles upon which the account is stated are correct, and the evidence properly received by the auditor. An account rendered by the defendant to the plaintiff is proper evidence for the plaintiff before the auditor. A teller of a bank is not liable for losses incurred during his absence from the bank.

Although the bank took bond and security from their teller for the faithful performance of the duties of his office, yet they may recover, in an action for money had and received, any balance of money remaining in his hands unaccounted for.

A judgment against the bank, in a suit upon the teller's bond, is not a bar to an action for money had and received by him for the use of the bank.

If evidence be given to the jury, without objection, which the Court afterwards decides to be inadmissible, the Court will instruct the jury that it is not evidence properly before them.

ASSUMPSIT for money had and received, being the balance of money in the defendant's hands as second teller, not accounted for.

This cause was referred to an auditor (Mr. Redin,) to state the account, under the Maryland Act of 1785, c. 80, § 12.

The auditor reported the evidence on which his statement of the account was founded, and the objections made to it before him, and the principles upon which he found the balance due.

The report states that certain parts of the evidence were objected to by the defendant, and states the objections made.

Mr. Jones, for the defendant, contended that the whole account is to be proved now before the jury, in the same manner as before the auditor, and referred to the opinion of this court in the case of *Barry v. Barry*, at December term, 1827; [*ante*, 120.]

But the COURT (*nem. con.*) said that the exceptions to the proceedings of the auditor appearing, upon the report, to be confined to the admissibility of the evidence, and to the principles upon which the auditor acted in ascertaining the balance, and no exception having been taken to that balance, or to any item of the account, of which it is stated to be the balance, if the Court should be of opinion that the auditor was right in receiving that evidence, and in the principles upon which he made up the account, his report of the balance is *primâ facie* evidence that so much was due from the defendant to the plaintiff.

The next question was as to the admissibility of a paper, marked AA, which was a statement, made by the defendant, of his account as second teller, with the bank, and taken from one of the bank-books, and presented to the board of directors by the defendant, as an account showing the deficit in his accounts. The fact that it was in the handwriting of the defendant, and was offered by him to the directors of the bank as a true statement of his account, was stated, in the report, to have been proved by the deposition of *Mr. R. Smith*, taken before the auditor, and which did not appear to be objected to.

The COURT (*nem. con.*) decided that the paper AA was properly admitted by the auditor; and also that the defendant was not liable for losses which were incurred in his absence from the bank.

The Court, therefore, permitted the plaintiff to read to the jury so much of the auditor's report as shows the balance due from the defendant upon that principle; the auditor having stated the account in different ways, so as to meet any opinion of the Court upon the question of his liability for losses during his absence.

Mr Jones then contended, that the plaintiffs, by taking a bond with surety for the faithful performance of the duties of his office as teller, had thereby made an express contract upon the subject of his liability as teller, and therefore the law will not imply any other on that subject. In a suit on that bond the defendant pleaded that, although he had not accounted for all the money which came to his hands as teller, yet such default did not arise from want of fidelity; and upon demurrer to that plea, the Court decided in favor of the defendant, being of opinion that the bond

only required fidelity. It is agreed that this matter may be considered by the Court as if it were a demurrer to a plea of a former judgment upon the same cause of action.

Mr. Swann and *Mr. Lear*, *contrà*. This suit is not for the same cause of action. That was for a breach of the condition of the bond; this is upon the general liability, which the law raises, to repay money received by the defendant for the plaintiffs' use. The evidence to support this action would not have supported that; nor would the evidence in that support this.

The COURT (MORSELL, J., *contrà*.) was of opinion that it was not the same cause of action.

The bond, plea, and judgment of the Court having been read to the jury by *Mr. Jones*, without objection, before the Court had given that opinion,

Mr. Swann, for the plaintiffs, moved the Court to instruct the jury that the papers so read to them were not evidence properly before them; and

The COURT (MORSELL, J., *contrà*.) so instructed them.

Verdict for plaintiffs, \$5,743.26, with interest from 19th December, 1825.

Bills of exception were taken, but no writ of error was prosecuted.

EDWARD CHARLES v. SIMEON MATLOCK.

Under the Maryland Act of 1793, c. 45, § 6, a mechanic may take as an apprentice any male child until he arrive at the age of twenty-one years; and an indenture, made by one justice of the peace only, for five years' service of the boy, was, under the seventh section of the act, enforced by the Court, after the boy had been some time with the master, (who was a tailor,) and was able to earn eight or nine dollars a week by working at the trade; although one justice of the peace had no authority so to bind him, and although the age of the boy was not specified in the indenture, and although the indenture was not seen by the Orphans' Court, nor recorded, nor signed by the boy or his mother, who was his only living parent, nor was her approbation thereof notified by an indorsement on the same.

THIS was the petition of an infant, to be discharged from the custody of the respondent, who claimed him as his apprentice, under an indenture made by one justice of the peace only, for five years' service. The indenture did not specify the age of the boy, and was not recorded in the Orphans' Court, nor seen by that court, nor its approbation, or that of the mother, who was the only living parent, indorsed thereon.

The sixth section of the Maryland Act of 1793, c. 45, § 6, is in these words:—"That it shall and may be lawful for any manufacturer or mechanic to take, as an apprentice, any male

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child until he shall arrive at the age of twenty-one years; provided, always, that the contract so made shall specify the age of the child at the time of making the said contract, and that the parent or parents of such child, if living, or, if an orphan, the Orphans' Court of such county as the child shall reside in, shall see the contract within two months after its execution, and notify their approbation thereof by indorsement on the same; and that the said contract shall be recorded among the records of the Orphans' Court, and the sum of three shillings shall be paid by the master of the said apprentice therefor; and, when so recorded, the said contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the Orphans' Court."

By the seventh section of the same act it is, among other things, enacted, that "in case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court, may award and compel the terms, or any part of the terms, to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service till such apprentice is or shall be discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

Mr. Beale and *Mr. Hellen*, for the petitioner, contended that the indenture was void, and constituted no contract: 1st. Because one justice of the peace alone has no authority whatever to bind out a child as an apprentice, nor to make a contract for him. The law of Maryland only gives the power to the Orphans' Court, or to the father of the child, or to the trustees of the poor, (whose authority is limited to the children under their care in the poor-house of the county,) or two justices of the peace, when the Orphans' Court is not in session. The authority given by the sixth section, to a manufacturer, or a mechanic, to take as an apprentice any male child, is to take with the consent of the child, who is thereby authorized to enter into such a contract for himself, with the approbation of his parents, if any, or of the Orphans' Court, if he is an orphan.

To make this a contract under that section, it must be shown that the boy made the contract on his part; that it specified his age; that his mother, or the Orphans' Court, saw the contract within two months after its execution, and notified their approbation by an indorsement on the same, and that it was recorded among the records of the Orphans' Court.

At common law, he could make no such contract. His

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authority is entirely under the statute, and can be exercised only in the manner, and to the extent designated in the statute. Recording is all-important to the validity of a contract; as much so as the recording of a deed for land. The statute says: "And, when so recorded, the contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the Orphans' Court."

There must be two parties to a contract. The parties to the contract, contemplated by the sixth section, are the mechanic and the boy. Here is no evidence whatever, that the boy entered into any contract. The indenture purports to be made between the justice of the peace and the mechanic; and it does not appear that the assent of the boy was ever asked.

In the case of *Ballard v. Edmonston*, in this Court, at October term, 1823, (2 Cranch, C. C. 419,) the indenture was signed by the mother of the boy, and by Ballard, who was a tailor, but not by the boy. The indenture did not specify the age of the boy, but he was to serve nine years. He had served part of the time, and *Mr. Ashton* contended that it was a contract which the Court could and ought to enforce under the seventh section of the act.

Mr. Coxe, on the contrary, contended that that was not a contract defective in form only, and therefore within the seventh section, but it was no contract at all, as the mother had no right or authority to bind out her child. And of that opinion was the Court, (THRUSTON, J., absent.)

So in the case of *Handy v. Brown*, in this Court, at December term, 1809, (1 Cranch, C. C. 610,) this COURT (FITZHUGH, J., absent,) decided that an indenture entered into and signed by a boy of sixteen years of age, without any evidence of the assent of his parents, or of the Orphans' Court, was not a binding indenture under the Maryland law; and, if it could be considered as a contract for necessities, yet it did not create the relations of master and apprentice.

Mr. Key, *contra*, considered the objection as going to the form of the contract only, except the assent of the mother, within the two months after the execution of the indenture, which he was ready now to prove, although her approbation had not been indorsed upon the contract.

CRANCH, C. J. I think there was no contract binding the boy, because the age was not inserted; because neither the approbation of the father, nor mother, nor Orphans' Court was indorsed on the contract; because it was not recorded in the Orphans' Court; and because one justice of the peace had no authority to bind out an apprentice in any case whatever. These requisitions of the statute, I think, are necessary to the validity of the

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contract, agreeably to the decision in *Ballard v. Edmonston*. Whatever is necessary to the validity of the contract is matter of substance. An infant cannot contract under seal, but in the manner and to the extent prescribed by statute. A limited power must be strictly executed. The acts not having been done, which I deem necessary to the validity of the contract under the statute, I am of opinion that there was no contract.

The COURT, however, considered the objections as objections to form only, except that to the want of the assent of the mother; but were of opinion that such assent may now be proved, although not indorsed within the two months; that the sixth section does not require the recording in any limited time, and that it may now be done, (upon this point, however, MORSELL, J., dissented,) and that the time of service, being limited to five years, is equivalent to the insertion of the age of the child.

The petition was dismissed.

GAREY'S EXECUTRIX v. UNION BANK OF GEORGETOWN.

If the defendant, indorser of a promissory note, believing that he has a good defence at law, is induced to confess judgment, by the assurance of the plaintiff's attorney-at-law, that, if he did so, the plaintiff would immediately proceed to levy, by execution, the amount thereof from the maker, who, he assured the defendant, had sufficient property in the county to satisfy the same; and if the plaintiff afterwards refuses so to proceed against the maker, although requested so to do, and the maker becomes insolvent, a court of equity will decree a perpetual injunction.

Quære? Whether the answer of a corporation aggregate, under its seal, not excepted to, and responsive to the allegations of the bill, is such evidence for the defendant that the Court cannot decree against it, unless contradicted by one witness corroborated by others, or by the circumstances of the case.

BILL IN EQUITY for a perpetual injunction, to stay proceedings at law upon a judgment confessed by the defendant at law, the present complainant.

The bill, filed December 2, 1819, states that the complainant's testator was indorser of Merrill's note, discounted by the Union Bank of Georgetown. That, after the testator's death, the complainant was requested, by the attorney-at-law of the bank, to confess judgment on the note, and was assured by him that, "if she did so, and did not dispute her liability on the note, the bank would immediately proceed to levy, by execution, the amount thereof from Merrill, who, he assured her, had sufficient property in the county to satisfy the same," and advised her "that she would thus be saved from her liability for said debt," and "prevailed upon her to make no defence to the suit at law,

but voluntarily to confess judgment." That she then had "a valid defence against the said suit, the plaintiff not having made the due and legal demand, and given the due and legal notice, so as to bind the indorser thereon;" "that the said attorney of the bank well knew the same," and made the said propositions to her, to prevent her from contesting the suit. That Merrill had then, and for some time afterwards, in Georgetown, sufficient property to pay the judgment, and that it might have been recovered by execution, which she repeatedly urged the bank to issue, according to the agreement upon which she confessed the judgment. But the bank continued to indulge the said Merrill for a long time, and permitted him to leave the district, and take away with him all his property, and have taken no effective measures to recover the money from him, and he is now insolvent. That the bank threatens to issue execution against the complainant, &c.

The prayer of the bill is, "that the said judgment may be opened, and the complainant be permitted to make her defence against the same, or such other order may be taken therein as the court shall direct," and for subpoena and injunction against further proceedings at law, on the judgment against the complainant; and for general relief, "according to law and equity."

The answer of the bank, under its corporate seal, avers that the money was loaned entirely upon the credit of the complainant's testator, Everard Garey. That the judgment was obtained against the complainant at December term, 1817. It denies that the attorney of the bank persuaded the complainant to confess the judgment, and promised if she would do so, that the bank would immediately proceed to levy, by execution, the amount from Merrill. It denies that the bank ever directed or authorized its attorney to hold out any inducements to the complainant to confess the judgment, or to make any such persuasions and promises as are set forth in the bill. It denies that the complainant had any valid legal defence, and avers due and legal demand and notice. It denies that Merrill had, at any time, after the judgment, unincumbered property whereon execution could have been levied, and out of which the judgment could have been satisfied. It denies negligence in recovering the money from Merrill, and indulgence to him without the knowledge and concurrence of the complainant. It avers that the bank offered to assign to her the judgment against Merrill, before he left the district, which she refused to accept.

The evidence consists of the answer of the bank, and the depositions of Daniel Renner, David English, James A. Magruder, G. Cloud, and E. Riggs, all taken on the part of the complainant.

Daniel Renner testifies, that before Merrill left the district, he, at several times, at the complainant's request, applied to the board of directors, of whom he was one, to issue execution against Merrill. That no answer was given by the board, or, if any, it was to this effect, that they were not bound to press Merrill; that the complainant, if she pleased, could pay the judgment, and could then adopt such course as she pleased.

James A. Magruder testifies, that, according to the best of his knowledge and belief, Mr. Wiley was the attorney of the bank at the time of the confession of judgment, and that it was then known to the bank, that many suits against indorsers for trial at that term, were in jeopardy in consequence of the then late decision of the Court, as to the insufficiency of the demand and notice on the 4th instead of the 3d day of grace. That he understood from Mr. Wiley that he was requested by the bank, or some of its officers, to adjust all such cases, and get judgments confessed by the parties, so as to avoid such defences being made by the indorsers. That he, Magruder, was requested by Mr. Wiley, to call on several of the indorsers, and among others, on the complainant, with a view to make such adjustment; "and did advise her to see Mr. Wiley, who was friendly to her, and would not advise her to do any thing that was against her interest. That there was much apprehension among the banks, at that time, that defendants who were indorsers, would become acquainted with that decision of this Court, and dispute their cases on that ground.

David English, cashier of the defendants' bank, testifies that the suit was in Mr. Wiley's hands. He does not know whether the decision was before or after the judgment against the complainant, but that it alarmed the bank as to their cases against indorsers. He knew nothing of the supposed agreement.

E. Riggs deposes, that he was one of the directors of the bank. That application was made, in behalf of the complainant, to the board, to call on Merrill for the debt, and to press him for payment. The reply of the board was, that Merrill was not then able to pay, but was about to remove where he would probably make money, and would be more able to pay; but that the complainant might, if she chose, pay the money to the bank, and have the judgment assigned to her; but the majority of the board did not feel themselves compelled to distress Merrill by complying with her request. One or two of the directors thought it ought to be done, but there was no division at the board. He did not know any thing of the supposed agreement, nor does he recollect that there was any defect in the manner or time of demand and notice as to this note.

G. Cloud deposes, in answer to leading interrogatories, that he recollects a conversation between the complainant and Mr. Wiley, on the subject of her confessing the judgment, and that he understood, from the conversation of both of them, that if she would agree and confess judgment, she was to be cleared, and the money to be made out of Merrill's property, as he (Mr. Wiley) said that he had ascertained that Merrill had property sufficient to satisfy the debt, that was clear of incumbrance, and that it was expressly on those conditions that she confessed judgment. That he heard the complainant tell Mr. Wiley, that he had promised her that if she would confess judgment on the note, it would be better for her, as he would have the execution levied on Merrill's property, and it would clear her from paying the debt, as Merrill had sufficient property that was clear of incumbrance. He (Wiley) admitted that he had told her so, and that the fault was not in him, but in the directors of the bank. He (Mr. Wiley) further said, that he did not think she was in danger of paying the debt, for he thought they would get it out of Merrill. He knows that Merrill had considerable property in possession, which he moved with him from Georgetown; but as to the title, he knows nothing further than that he heard Mr. Wiley say, that it was clear of incumbrance, and that he had sufficient to satisfy the judgment. He heard the complainant tell Mr. Wiley, she never would have confessed judgment if he had not told her that he would clear her, by instantly levying on Merrill's property, and that she verily believed that it was in his power to have execution issued at his will, which he admitted. That the reason assigned by Mr. Wiley for not carrying the agreement into effect, was, that the directors of the bank would not suffer the execution to issue, as they knew their debt to be safe, and did not wish to break up Merrill. That the complainant frequently applied to the directors of the bank, as well as to Mr. Wiley, to have execution issued before Merrill left Georgetown with his property. He (G. Cloud) frequently went to the bank, and to Mr. Wiley, upon this business for the complainant, but they would not suffer the execution to issue.

The cause was argued by *Mr. Coxe* and *Mr. Jones*, for the complainant, and by *Mr. Swann*, for the defendants.

The COURT (CRANCH, C. J. *contra*,) decreed a perpetual injunction.

CRANCH, C. J. The agreement (to levy execution upon the property of Merrill, immediately after the judgment,) is averred in the bill, denied in the answer, and averred by G. Cloud in his deposition, to have been confessed by Mr. Wiley, the attorney-at-law of the defendant, since deceased. In general, if the

material averment of the bill be positively denied by the answer, and be proved by one witness only, the Court cannot decree against the answer. It is said to be only oath against oath, and there must be something to turn the scale. But slight circumstances of corroboration have been considered sufficient for that purpose.

The circumstances which are supposed to be sufficient to turn the scale in the present case are,

1st. That the answer of the bank is not on oath, but the bill is.

2d. That the complainant repeatedly urged the bank to issue the execution against Merrill.

3d. That Mr. Wiley was the attorney of the bank.

4th. That the bank knew that many suits against indorsers were, at that term, in jeopardy, in consequence of the then late decision of the Court respecting what were since called the 4th day protests.

5th. That Mr. Wiley informed Mr. Magruder, that he was instructed by the bank to adjust all such cases, and get judgments confessed, so as to prevent such defences being made; and that Mr. Magruder was requested by Mr. Wiley, to call on several of the indorsers, and among others, the complainant, with a view to make such adjustment; and that he advised her to see Mr. Wiley, who, he assured her, was friendly to her, and would not advise her to do any thing against her interest.

6th. That there was much apprehension among the banks, at that time, that defendants who were indorsers, would become acquainted with the decision of the Court, and dispute their cases on that ground.

1. I do not know that it has ever been decided that the affidavit of a complainant to an injunction-bill, gives any weight to his cause upon the final hearing. It is required only as the ground of injunction, and, I believe, is never considered as evidence at the hearing, although the answer may not be upon oath. The reason why an answer in chancery, is evidence, is, I apprehend, not merely because it is upon oath, but because the complainant has required the defendant to answer, and has thereby made him a witness, and is bound to receive his answer as true as to those facts which he has called upon him to answer, unless the complainant can prove it to be false. If a defendant's answer be not on oath, the plaintiff, if he wishes to avail himself of that circumstance, must except to the answer on that ground. If he does not except, but files a general replication, I apprehend the answer, so far as it is responsive to the allegations of the bill, is as valid evidence for the defendant, as if it had been upon oath. If he calls upon a corporation aggregate to answer, he must receive the answer in the only way in which such a corporation can

Garey's Executrix v. Union Bank of Georgetown.

answer, namely, by its common seal. In a moral view, perhaps, such an answer would not afford as strong a presumption of truth, as an answer upon oath, because it has not the same legal and religious sanction; but as it regards the complainant, it is to be taken as true, until disproved, because it is his own evidence, called for and produced by himself; and as such it must be regarded by the Court. The answer, therefore, having denied the agreement alleged in the bill, it is incumbent upon the complainant in the present case, to prove it by at least one witness corroborated by other evidence.

2. The first circumstance supposed to corroborate the testimony of G. Cloud, is, that the complainant frequently urged the bank to issue the execution against Merrill. The witnesses who testify to that fact, do not say that she urged it on the ground of an agreement, or that she ever informed the bank of the agreement. Mr. English, the cashier, and Mr. Riggs, one of the directors, deny that they knew any thing of such an agreement. Mr. Renner, another of the directors, through whom the application of the complainant was made to the board, says nothing of the agreement, in his deposition taken by the complainant.

Mr. Riggs, says that the refusal to comply with the complainant's request, was by a majority of the board; that one or two of the directors were in favor of it. If that was the case, and there had been such an agreement, it is natural to suppose that it would have been urged as a reason, to induce the board to issue the execution against Merrill. If it was not urged, there is strong ground to infer that it did not exist. Mr. Renner, who made the application to the board, must have known it, if it existed; at least, it is strange if he did not. If there had been no such agreement, still it would have been natural and probable that the complainant would urge the bank to issue the execution against Merrill, as he was the principal debtor. Her doing so, therefore, without any allusion whatever to such an agreement, does not necessarily raise an inference, that such an agreement existed; nor can it be considered, as a corroboration of G. Cloud's testimony, on that point; on the contrary, the inference is clearly the other way, and instead of corroborating his testimony, tends strongly to diminish its weight.

3. The circumstance of Mr. Wiley's being the attorney of the bank, can hardly be considered as corroborating the testimony of Mr. Cloud, because it is a fact not disputed. The fact to be corroborated, is the agreement.

4. It is supposed to be a corroborating circumstance, that at the time of the supposed agreement, the bank knew that many suits against indorsers were at that term, (the term in which

the judgment was confessed, namely, December term, 1817,) in jeopardy, in consequence of the then supposed recent decision of the court, that the demand of payment of a note, on the day after the third day of grace, was insufficient to charge the indorser; and that Mr. Wiley was instructed by the bank to adjust such cases, and get confessions of judgment from indorsers, so as to prevent their making such defence; and that Mr. Magruder was requested by Mr. Wiley, to call on several of the indorsers, and among others the complainant, with a view to such adjustment, and that he advised her to see Mr. Wiley.

These facts depend upon the testimony of Mr. Magruder, who does not swear positively; he was sworn only to testify according to the best of his knowledge and belief; and it appears that he must have been mistaken as to dates, because the judgment against Mr. Garey was confessed in December term, 1817, and the decision of the Court which caused this alarm to the banks was not until the 11th of June, 1818, in the case of *Beeding v. Pic*, (2 Cranch, C. C. 152.) All the supposed corroboration, therefore, arising from the alarm of the bank at that decision, fails, and leaves no consideration for such a contract as is supposed to have been made, nor any such motive for Mr. Magruder's calling on the complainant.

I do not see, therefore, any evidence corroborating Mr. Cloud's testimony. That testimony being thus unsupported as to the main fact, could not, if it were in itself unexceptionable, prevail against the answer.

But his deposition appears to be the testimony of a willing witness, answering to leading questions, without cross-examination, and his character wholly unknown to the court. It consists only of the confessions of Mr. Wiley, the attorney of the bank, in conversations with the complainant, at divers times, after the confession of the judgment. He has not stated any circumstances of time or place, when and where he heard those conversations, except that they were between the years 1814 and 1820.

The conversation which he relies on, was evidently after the confession of judgment, and after December term, 1817, and after the bank had refused to issue execution against Merrill. And he makes Mr. Wiley contradict himself, by admitting that it was in his power to have issued the execution at his will, and yet saying the fault was not in him, but in the directors of the bank; and assigning as a reason for not issuing it, that the directors would not suffer it to be issued. Mr. Wiley died early in 1819. For these reasons, I cannot say that the contract is sufficiently proved to authorize this Court to deprive the bank of the benefit of its judgment at law, or that it is unconscientious in the bank to enforce it.

Bank of the United States v. Williams.

The COURT, however, as before stated, decreed a perpetual injunction; and the decree was affirmed by the Supreme Court, 5 Peters, 99.¹

BANK OF THE UNITED STATES v. BROOKE WILLIAMS, Administrator of William B. Williams.

The report of the auditor under the Maryland Act of 1785, c. 80, is *primâ facie* evidence of the amount due, upon the principles and evidence stated in the report; and if those principles, and that evidence, are approved by the Court, so much of the report may be read to the jury, as shows the balance so stated, although before the jury is sworn, the defendant excepts to the evidence admitted by the auditor, and to his calculations, conclusions, and statements.

ASSUMPSIT for money had and received by the defendant's intestate, as second teller to the plaintiff's use.

The cause had been referred to Mr. Redin, as auditor, under the Act of Maryland, 1785, c. 80, § 12, whose report was filed on the 19th of December, 1825.

Mr. Jones, for the defendant, this morning, (December 31, 1827,) before the jury was sworn, filed what he called exceptions, which were as follows:

"The defendant excepts to the auditor's report in this case, 1st. on the ground of the evidence and statement therein contained, and 2dly. on the ground of the calculations and conclusions drawn from the same. The defendant excepts to all and singular the evidence, examined before the auditor, both written and oral; and excepts to the auditor's statement, and report of the same. The defendant excepts to all and singular the statements, and calculations founded thereon as reported by the auditor. W. Jones, for defendant."

Upon the trial he objected to the report as evidence.

But the COURT (*nem. con.*) permitted the plaintiff to read the auditor's statement of the balance, which he found due upon the evidence and principles stated in his report, which evidence and principles the Court is of opinion were correctly admitted and acted upon by the auditor.

The part permitted by the Court, to be read to the jury, was as follows:

"The auditor finds and reports that the balance of loss and gain account, and the total deficiency in William B. Williams's

¹ The fact that the judgment was confessed five months before the decision of this Court, which was assigned as the motive for making the agreement with the complainant, did not appear in the transcript of the record sent to the Supreme Court.

Taylor v. Smith.

accounts, as second teller from the 21st of May, 1818, when he commenced the duties of the office, to the 25th of August, 1819, when he ceased to perform them, is the sum of one thousand one hundred and ninety one dollars and three cents."

Bills of exception were taken as in the case of the *Bank of the United States v. Johnson*, at this term, (*ante*, 228.)

But the plaintiff became *non-pros*.



ROBERT TAYLOR v. SMITH *et al.*, owners of Steamboat Surprise.

One partner in a steamboat company, who acted as master and engineer, cannot maintain an action at law against his copartners, for compensation as engineer.

INDEBITATUS ASSUMPSIT, for compensation as engineer of the steamboat Surprise, the plaintiff having been employed and paid as master.

It appeared in evidence, that he himself was one of the owners of the boat, and a member of the company; so that he was defendant as well as plaintiff.

Mr. Jones, for the defendants, contended that it was a partnership, and that the plaintiff could not sue his copartners at law.

Mr. J. Dunlop, contra, contended, that part-owners are not copartners, and cited the case of *Magruder's Trustee v. Bowie & Kurtz*, in this Court, at May term, 1825, (2 Cranch, C. C. 579,) which was an action at law, by an owner of one fourth of the ship Alleghany, for his share of the freight, against the ship's husband, who had received the whole, and who were also part-owners, in which the Court said that the interests of part-owners were separate and not joint, and that one might maintain an action, for his share of the freight, against others who had received the whole.

The COURT, however, in the present case, inclined to think that the plaintiff must be considered as a partner; and that as his claim was for services on board the boat, he, being himself a copartner, would have to bear his proportion of the value of those services, and the defendants had a right to have the whole partnership concerns settled, and the plaintiff's share ascertained before they could be compelled to pay him any thing.

The plaintiff became nonsuit, with leave to move to reinstate the cause. A motion was made accordingly, which was overruled, June 5th, 1838.

THOMAS L. MITCHELL v. WILLIAM WILSON.

Whatever may be the words of grant in a deed, it is the office of the *habendum*, to limit and confine them, and to ascertain the commencement and duration of the estate created or conveyed by the deed.

A deed of bargain and sale was made, (and duly acknowledged and recorded,) by J. W. to his brother T. W., of a negro woman named Bet, and her increase, and a negro boy named Patrick, "from and after the date hereof," "with this reserve, that they are to remain with J. W. my father, who is to hold and have the entire use and benefit of them during his life, and at his decease my said brother Thomas, his heirs, executors, administrators, or assigns, to take, hold, and possess them ever after; to have, and to hold, the said negro woman Bet, and her increase, as aforesaid, and negro boy Patrick, (from and ever after the decease of my father, as aforesaid,) unto my said brother Thomas Wilson, his heirs, executors, administrators, and assigns, with general warranty from and after the decease of my father, as aforesaid." T. W. died in the lifetime of the father. Held, that neither T. W. nor the father took any thing by the deed.

The possession of a slave for twenty years, is *primâ facie* evidence of a good title in a plaintiff in replevin, against everybody who does not show a better.

If a replevin be discontinued, the defendant is not guilty of a contempt, in taking possession of the goods, they being no longer in the custody of the law.

REPLEVIN for a negro woman named Mahala.

This cause, which was discontinued at December term, 1826, for want of the defendant's appearance, was by consent of the parties, at May term, 1827, (*ante*, 92,) reinstated, with a mutual release of errors, and it was agreed that upon a motion for the return of the property, the whole merits of the cause should be decided.

The motion to return the property, was accordingly made and argued at that term, by *Mr. Key* for the defendant, and by *Mr. Coxe* and *Mr. Ashton* for the plaintiff in replevin.

CRANCH, C. J. delivered the opinion of the Court, (THRUSTON, J. absent.)

This is an action of replevin, brought on the 15th of May, 1826, by Thomas L. Mitchell, against William Wilson, administrator of Thomas Wilson, for a female slave, named Mahala, about twenty-one years of age. Mahala was the daughter of Bet.

On the 20th of July, 1787, Joseph Wilson, son of Lancelot, made a bill of sale of his slave Bet, then about six years old, and three other slaves, to his son Joseph Wilson, junior, and his heirs and assigns, in consideration of £105 paid by him to, or for his father. This bill of sale was recorded on the 7th of August, 1787, but was never acknowledged. Joseph Wilson, junior, was then about twenty-seven years old, had a wife and family, and lived in the same house with his father, who delivered the slaves to him, and who was an intemperate man, and in embarrassed circumstances, and for whom his son had paid

debts to the amount of £105. The slaves remained in the joint family of the father and son until the father and son moved into separate houses in the same neighborhood, when the slaves, excepting Bet, remained with the son, but were often in the service of the father. Bet lived with the father, and was an idiot, lame, and worthless.

On the 31st of December, 1801, Joseph Wilson, Jr., made a bill of sale, under seal, in consideration of £25, to his brother, Thomas Wilson, of Bet, then said to be about twenty-three years of age, "and all her increase, from and after the date hereof, and her son, a negro boy named Patrick, about eighteen months old; with this reserve, that they are to remain with Joseph Wilson, my father, who is to hold and have the entire use and benefit of them during his life, and, at his decease, my said brother, Thomas Wilson, his heirs, executors, administrators, or assigns, to take, hold, and possess them ever after: To have and to hold the said negro woman, Bet, and her increase, as aforesaid, and negro boy, Patrick, (from and after the decease of my father, as aforesaid,) unto my said brother, Thomas Wilson, his heirs, executors, administrators, and assigns," with general warranty, "from and after the decease of my father, as aforesaid."

This bill of sale was, on the day of its date, acknowledged before a justice of the peace in Prince George's county, and enrolled on the 2d of January, 1802.

Bet continued in the possession of the father. In the spring of 1805, however, she was found, with her child, Mahala, then from six to nine months old, living in the family of Thomas L. Mitchell, the plaintiff, whose wife was the daughter of the said Joseph Wilson, of Lancelot, and sister of Joseph Wilson, Jr. Mahala continued in the possession of Thomas L. Mitchell, from that time until two or three days before this writ of replevin was issued; when the defendant, William Wilson, son of Thomas, having then recently taken letters of administration in this district, on the estate of Thomas Wilson, who died about the year 1805, probably before the birth of Mahala, and certainly several years before the death of his father, Joseph Wilson, of Lancelot, seized upon Mahala, and claimed her as part of his father's estate; in consequence of which seizure, Thomas L. Mitchell obtained this writ of replevin.

On the 1st of February, 1806, Joseph Wilson, of Lancelot, by deed of bargain and sale, duly acknowledged and recorded, conveyed to Thomas L. Mitchell and his wife the slave Mahala, and all her posterity, she then being and remaining in their possession.

Bet was always in possession of Wilson, the father, or of Thomas L. Mitchell, from the time of the separation of the families of the said Wilson and his son, Joseph, until the death of Wilson, the father, about fifteen years ago. Neither Bet nor Mahala was ever in the possession of Thomas Wilson, who lived in Ann Arundel county. Wilson, the father, and his son Joseph, lived in Prince George's county, near Bladensburg.

It does not appear how many children were left by Thomas Wilson, nor of what age. If he died in 1805, the youngest must be now at least twenty-one years old.

This is a motion by the defendant for a return of the property replevied; and it is agreed that the Court shall, upon that motion, decide the whole merits of the case, without a jury.

On the part of the defendant it is contended that, by the deed of 1787, from the father to his son Joseph, the legal title of Bet was transferred to the son; and that, by his deed of 1801, it was conveyed to his brother, Thomas Wilson, and that Mahala, whether born before or after the death of Thomas Wilson, became part of his estate, which has never yet been legally distributed or settled.

The possession having always been in Mitchell, the burden of proof is upon the defendant to show a better title. It seemed to be admitted by Mr. Wilson, in his testimony, that the possession of Bet always remained in his father until his death. But if the deed of 1787 were *bonâ fide*, and for a valuable consideration, that circumstance did not prevent the operation of the deed. The title was transferred to his son.

The Act of Maryland, 1729, c. 8, § 5, for the relief of creditors against secret sales, does not make void the sale against any person claiming under the vendor; and the Supplementary Act of 1763, c. 13, applies only to gifts, not to *bonâ fide* sales. The fact of its being a *bonâ fide* sale, for valuable consideration, depends principally upon the testimony of the witness, the vendee, and the averment in the deed itself. He swears positively and unequivocally, that he paid upwards of £100 of his father's debts, and that such payment was the consideration of the deed. His testimony is corroborated by that of other witnesses, who have spoken of the embarrassed situation and bad management of the father, and, by the fact that the creditors of the father have never pursued this property in the hands of the son. An attempt has been made to discredit the general reputation of the witness for veracity; but, upon the whole, we think his credit is sustained, although there seemed to be a strong bias in favor of the defendant.

We take the fact, therefore, to be, that the deed of 1787 was *bonâ fide*, and for a valuable consideration, and transferred the legal title in Bet to Joseph Wilson, the son. It is not so clear what was the effect and operation of the deed of 1801, from Joseph, the son, to his brother, Thomas. It purports to be for a valuable consideration, and *bonâ fide*, and is duly acknowledged and recorded; but did it pass a present interest to Thomas Wilson? It purports to bargain and sell the negro woman, Bet, "and all her increase, from and after the date hereof," and the negro boy, Patrick, "with the reserve, that they are to remain with Joseph Wilson, my father, who is to hold and have the entire use and benefit of them during his life, and at his decease my said brother, Thomas Wilson, his heirs," &c., "to take, hold, and possess them ever after: To have and to hold the said negro Bet and her increase, as aforesaid, and negro boy, Patrick, (from and ever after the decease of my father, as aforesaid,) unto my said brother, Thomas, his heirs," &c.

Whatever may be the words of grant in a deed, it is the office of the *habendum* to limit and confine them, and to ascertain the commencement and duration of the estate created, or conveyed by the deed.

Here, in the very terms of the grant, there is a reserve of the possession and entire use and benefit of them to the father, during his life; and it was uncertain whether Thomas would survive him, and, in fact, he did not. And it is further said, in the terms of the grant, that "at his," the father's, "decease," the brother was "to take, hold, and possess them." If he could not take, hold, or possess them, nor have any use or benefit of them during his father's life, and he died before his father, did any thing vest in him by the deed?

But the *habendum* is decisive. He was to have and to hold after the decease of his father. The estate was not to commence until the death of his father. He died before his father, and therefore the estate never did commence. Nothing ever passed from Joseph Wilson, Jr., by that deed. It created no estate in his father, because his father was not a party, and because there are no words of grant, or *habendum*, to the father. Thomas cannot be considered as holding the legal estate as trustee for the father, because the legal estate never vested in Thomas. It remained in Joseph Wilson, Jr.; and the contest must now be between his legal title and the possession of Mitchell, for the father having no legal title, could convey none, by his deed of 1806, to Mitchell, after the death of Thomas. The question remaining is, whether the long possession of Mitchell is a bar to the legal title of Joseph Wilson, Jr. Upon that point we should like to hear an argument.

 Mitchell v. Wilson.

At the adjourned October session of May term, 1827, the point was argued by *Mr. Key*, for the defendant, and by *Mr. Jones* and *Mr. Ashton*, for the plaintiff.

Mr. Key contended that the possession of a chattel does not give title. The statute of limitations is only a bar to the remedy, not to the right. It does not destroy the cause of action. If it destroyed the right, it would not be necessary to plead it. It might be given in evidence on the general issue. 1 Cranch, Appendix, 466; *Quantoock v. England*, 4 Burr. 2628; *Hodsdon v. Horridge*, 2 Saund. 63; Ballantyne, 188, 267.

The only cases opposed to this principle are the Virginia cases, in which it has been decided that five years' possession of a negro gives good title against all the world. But they depend upon the peculiar Statutes of Frauds of Virginia, in respect to the transfer of negroes. They are a peculiar kind of estate, being neither chattels nor lands. They were formerly considered as real estate, subject to Dower and Curtesy; but in 1792 the legislature of Virginia enacted that they should be no longer real estate. The cases do not say that possession of any other chattel gives title. *Newby v. Blakey*, 3 Hen. & Mun. 57; *Elam v. Bass's Executor*, 4 Mun. 301; *Garth v. Barksdale*, 5 Mun. 101; *Gay v. Moseley*, 2 Mun. 545; Virginia Statutes, 1792, c. 103, § 49; Old Rev. Code, p. 192; 1705, c. 3. In 1725, they were exempted from execution for debt; and, in 1758, they could be only transferred by deed, or will, like lands. Old Virg. Justice, 318; *Taylor v. Atkins*, 1 Burr. 119. Entry is necessary to maintain ejectment. Runninton on Ejectment, 99. By the Maryland Acts of February, 1777, c. 15, § 7, and 1780, c. 5, § 14, and Appendix, 1782, c. 55, § 5, exceptions to the Act of Limitations may be given in evidence, on a general replication to the plea of limitations.

In England, twenty years' possession of land gives good title, because the statute takes away the right of entry after that time, not merely the legal remedy; so that the statute of limitations need not be pleaded in ejectment.

This case is to be decided according to the law of Maryland; and in *Smith v. Williamson*, 1 Har. & Johns. 147, it was decided that, in replevin, the statute of limitations must be pleaded; because it only goes to the remedy, not to the right.

Mr. Coxe and *Mr. Ashton*, *contrâ*. The Court has decided that neither the plaintiff nor the defendant has a documentary title. The question, then, is, whether twenty years' possession of the slave is a good title for a plaintiff in replevin?

The object of the statute of limitations is, to protect the possession under a title supposed to be good. It was founded upon

great principles, and upon like principles has been expounded by the courts; and they have applied its principles to analogous cases, not embraced in the letter of the act. Thus, set-off may be objected to on the trial, if barred by the statute of limitations. Ballantyne, 94. When a party can plead it, he must; but when he cannot plead it he may give it in evidence. In trespass, as well as in ejectment, twenty years' possession gives good title. The same reason applies to chattels; and the same reason which applies to negroes, is applicable to any other chattel. *Shelby v. Guy*, 11 Wheat. 371; *Brent v. Chapman*, 5 Cranch, 358. The Supreme Court did not rely on the statute of frauds of Virginia, but on the statute of limitations. This is a motion for a return of the property, with an agreement that the Court may decide upon the whole merits of the case. If, then, the plaintiff could, in any way, plead the statute of limitations, it will be considered by the Court as pleaded.

While Mitchell had the possession, he had a good title, of which he could not be deprived by any legal process, or remedy; and there is no legal right without a remedy. Under the agreement in this suit, the plaintiff cannot be prevented from availing himself of the protection of the statute of limitations.

Mr. Key, in reply. If the act of limitations went to the right, it would be unconstitutional, because it would impair the obligation of the contract. The statute does not say, that the owner shall not retake his property, after the lapse of the three years which bars his action. A man who loses his goods, or whose slave runs away, may lawfully take peaceable possession of them wherever he can find them, and then holds them in all his original right.

The COURT took time to consider until this term, and on the 2d of January, 1828,

CRANCH, C. J., delivered the opinion of the Court.

This is an action of replevin for a female slave named Mahala. Upon a motion for a return of the slave to the defendant, this Court, at the last term, (May, 1827,) was of opinion that the legal title was not in the defendant, and it appeared that the slave never was in the possession of the defendant's intestate, nor of the defendant, except for two or three days before the writ of replevin was issued, when the defendant, claiming title as administrator of Thomas Wilson, took possession of her. There was no evidence of title in the plaintiff, except that he had been in possession of her, claiming title, ever since she was six or nine months old, when she and her mother Bet, were seen by the witness in the possession of the plaintiff; and the probability was, that Mahala was born in his possession, his wife being the

daughter of Joseph Wilson, of Lancelot, the former owner of Bet, who was a crippled and worthless idiot.

The COURT, on examination of the evidence upon the motion for a return of the slave, was of opinion that the documentary legal title of Bet, at the time of the birth of Mahala, was in Joseph Wilson, junior, the son of Joseph Wilson, of Lancelot, and requested an argument upon the question whether the long possession of the plaintiff, Thomas L. Mitchell, either gave, or was evidence of, such a title as would enable the plaintiff to maintain replevin against the present defendant, William Wilson, the administrator of Thomas. That argument was heard at the adjourned session of May term, in October.

It was contended for the plaintiff, that such a possession as would have been a good bar to an action of *detinue* constituted a valid title against everybody.

On the other hand, it was said, for the defendant, that there was no limitation against a man's taking possession of his goods and chattels. That the statute of limitations was a bar only to the action, not to the right. That it was not like the possession of lands, for in that case, the statute takes away the right of entry, without which the action of ejectment cannot be maintained. That in ejectment, it is not necessary to plead the statute, because the plaintiff must show a right of entry, as a part of his title to recover; but in mere personal actions, it is necessary to plead it, because it is only a bar to the remedy. That in Maryland it has been decided, that in replevin, the statute must be specially pleaded. *Smith v. Williamson*, 1 Har. & Johns. 147. That the cases in Virginia, in which it has been decided, that five years' possession of a slave gives a substantive title to a plaintiff in *detinue*, were cases under the peculiar statute of frauds of that State, where slaves were, for a long time, considered as real estate.

In reply to which, it was said, for the plaintiff, that the Supreme Court of the United States, in the case of *McIver v. Ragan*, 2 Wheat. 29, said, that "the statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those, who have remained in possession, under color of a title believed to be good."

That such is emphatically the case, in the present instance. That the principles of the statute have been found to be so beneficial, that courts, both of law and equity, have extended them to analogous cases, not embraced by the letter of the statute; and although courts of law have decided, that it must be pleaded where it can be pleaded, yet, where, it cannot be pleaded, they

have permitted it to be given in evidence, as in the case of a set-off barred by the statute, &c. That the principle of the rule, that twenty years' possession of lands gives a substantive title upon which a plaintiff in ejectment may recover, applies equally to the case of personal chattels; and has been so applied by the Court of Appeals, in Virginia, in the case of *Newby v. Blakey*, 3 Hen. & Mun. 57, and by the Supreme Court of the United States in the cases of *Brent v. Chapman*, 5 Cranch, 358, and *Shelby v. Guy*, 11 Wheat. 371. That although there were cases of slaves, yet the principle, the reason, and the law, upon which those cases were decided, are equally applicable to chattels of any other description.

These cases were not decided upon the statute of frauds, but upon the statute of limitations, as clearly appears from a remark of the Supreme Court, in its opinion in the case of *Shelby v. Guy*, 11 Wheat. 374, where the Judge observes, that "the dates and facts do not bring the case within the operation of the Statute of Frauds of 1785."

These cases and principles seem to me to be decisive of the present question.

It is not necessary, in this case, to decide that the possession of the plaintiff gives him a good title against all the world. It is sufficient in this action, and against this defendant, who has no title or right of possession, that it is *prima facie* evidence of title, and is sufficient against everybody who does not show a better.

It having been agreed, that the Court should, upon this motion for a return of the property, decide the whole merits of the cause, I am of opinion that the defendant ought to confess judgment for one cent damages and costs.

MORSELL, J., concurred. THRUSTON, J., absent.

Judgment for the plaintiff.

THOMAS MAGNER v. JAMES W. JOHNSTON.

The plaintiff, in October, 1826, sold a horse to the defendant for his bill on the Post-master-General, payable on the 1st of January following.

The defendant gave the bill, but countermanded it the next day; and acceptance was refused; held, that the plaintiff had no right of action of *indebitatus assumpsit* for the price of the horse, before the 1st of January.

INDEBITATUS ASSUMPSIT for \$60, for a horse sold and delivered by the plaintiff to the defendant.

The defendant offered evidence, that the original agreement was, that the plaintiff should sell the horse to the defendant for

the plaintiff's draft or bill on the postmaster-general for \$60, payable on the 1st of January, 1827. The sale was accordingly so made, on the 19th of October, 1826. The defendant drew the bill, and delivered it to the plaintiff, who delivered the horse to the defendant. The plaintiff, on the next day countermanded the bill; and acceptance was refused; and the plaintiff on the same day, (October 20,) brought this action of *indebitatus assumpsit*, for the price of the horse.

Mr. Wallach, for the defendant, contended, that the plaintiff had brought his action too soon; he should have waited till after the 1st of January. *Dutton v. Solomonson*, 3 B. & P. 582.

Mr. Morfit, contra, cited Chitty on Bills, 128, note *c*; *Puckford v. Maxwell*, 6 T. R. 52; *Stedman v. Gooch*, 1 Esp. R. 5.

The COURT, (THRUSTON, J., absent,) at the request of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that it was part of the original contract of sale, and a condition thereof, that the plaintiff should take the defendant's draft on the postmaster-general, payable on the 1st of January, the plaintiff cannot recover in this action of *indebitatus assumpsit* for the price of the horse, the plaintiff having commenced his action before the 1st of January, although the defendant himself was the cause of the non-acceptance of the draft.

WHITE v. MACON.

If an account be received and not objected to for several years, the jury may infer that it is correct.

INDEBITATUS ASSUMPSIT for goods sold and delivered.

The defendant, by letter, acknowledged himself to be indebted to the plaintiff, but did not state the amount. A witness testified, that afterwards, and about three years before the commencement of this suit, he forwarded to the defendant an account, a copy of which he annexed to his deposition.

The COURT (THRUSTON, J., absent,) instructed the jury, at the prayer of the plaintiff's counsel, that if they believed from the evidence, that the defendant received that account, and there be no evidence that he objected to its amount, they may infer that it was correct.

Verdict for plaintiff, \$103, and interest from 2d October, 1821. Motion for new trial overruled. See 5 Har. & Johns. 63.

Mr. Coxe for plaintiff. *Mr. Barrell* for defendant.

JAMES WILLIAMS'S EXECUTORS v. MOSES POOR.

The auctioneer is bound by the instructions of the owner.

If the price is limited, his duty is to set the goods up at that price; if they will not sell at the price limited, he must not sell; and if the goods perish, because they cannot be sold at that price, the loss must fall upon the owner.

THIS was an action against an auctioneer, for not accounting for goods deposited with him to be sold at a limited price; as per schedule amounting to \$450.18.

Mr. Hall, for the defendant, contended that the auctioneer was not bound by the limitation of price; that if he set them up, he was bound to sell them to the highest *bonâ fide* bidder, whatever might be the amount of the bid; and that the auctioneer was not liable if the goods perished because they would not sell for the price limited by the owner. *Bexwell v. Christie*, Cowp. 395.

Mr. Wallach, for the plaintiff, contended, that the defendant should have accounted with the plaintiff's testator, for the goods, at the limited price, or returned them.

The COURT instructed the jury, in effect, that the auctioneer was bound by his instructions; and if the price was limited by the owner, his duty was to set them up at that price, and if they would not bring it, he had no right to sell them; and if they perished because they could not be sold at that price, it was not his loss.

Verdict for the defendant.

UNITED STATES, for the use of J. T. Ritchie, Guardian of John W. Ott, v. JOHN LITLE.

When the record set forth in the declaration is not the foundation of the action, but only matter of conveyance or inducement, *nul tiel record* is not a good plea, for it is no answer to the whole count.

When the record is showed forth in the declaration, the defendant may deny the operation thereof.

An order of the Orphans' Court, that J. T. R. enter into bond as guardian to J. W. O., is not an appointment of J. T. R. to the office of guardian.

THIS was an action of debt for \$18,000, the penalty of Mrs. Ann Ott's administration-bond, in which this defendant, John Litle, was surety. It was brought in the name of the United States, for the use of John T. Ritchie, guardian of John W. Ott, the infant son of Doctor John Ott, upon whose estate Mrs. Ann Ott, his widow, was administratrix.

The condition of the bond was in the usual form, that she should "well and truly perform the office of administratrix, according to law, and should, in all respects, discharge the duties required by law of her as administratrix, without any injury or damage to any person interested in the faithful performance of said office."

The declaration recites the bond with its conditions; and avers, that "the said Ritchie was appointed guardian of the said John W. Ott, infant, by order of the Orphans' Court of the county aforesaid, passed, made, and entered on the ninth day of August, 1825, as will more fully appear by the record of the said Orphans' Court, which for greater certainty, is here referred to, and an official transcript from which is to the Court now here shown, and is in these words :

"Tuesday, the 9th August, 1825. The Court met, &c.

"John T. Ritchie files in court a written application from John W. Ott, that John T. Ritchie may be made his guardian. Whereupon it is ordered, that said John T. Ritchie enter into bond, as guardian of John W. Ott, in the penalty of \$10,000, with Doctor Charles A. Beatty, and Mary C. Ott, as securities.

"Copy from the record of the proceedings of the Orphans' Court of Washington County, District of Columbia.

"Test, Henry C. Neale, Reg. Wills."

The breach assigned is, that Mrs. Ott did not pay over to the said J. T. Ritchie, \$1,000, according to an order made by the Orphans' Court, on the 10th of August, 1825.¹

The defendant pleaded "that the said John T. Ritchie is not, nor ever hath been guardian of the said John W. Ott, in manner and form, as the plaintiffs have above, in the said declaration, in that behalf alleged; and this, he the said defendant prays may be inquired of by the country, &c."

To this plea there was a general demurrer and joinder.

Mr. C. C. Lee and *Mr. Jones*, in support of the demurrer, contended that the defendant could not deny the guardianship without denying the record, by plea of *nul tiel record*.

Mr. Marbury, contra. It is not necessary that the plaintiff should show himself to be guardian by matter of record. He might have been guardian by other means; and the record does not show an appointment by the Orphans' Court. It is only

¹ The declaration concludes thus; "and therefore they bring suit, &c., and the said plaintiffs by their said attorney, bring here into Court, the letters of appointment of the said John T. Ritchie, as guardian aforesaid, whereby it appears to the Court here, that the said John T. Ritchie is the guardian of John W. Ott, aforesaid, and has the care of his person and estate."

where the cause of action, or matter of defence, is matter of record, that it is necessary to refer to the record, or to plead *nul tiel record*. It is like the plea of never administrator.

Mr. Redin, on the same side, cited 1 Chitty, 481, and 2 Chitty, 450, that the plea of *nul tiel record* only denies the existence of the record. If J. T. Ritchie might have been guardian, although there might have been no such record, *nul tiel record* would have been a bad plea.

This Court has decided, in the case of *Forrest and Mauro v. Ritchie*, [ante, 147,] that the appointment was absolutely void, because the judge of the Orphans' Court had not jurisdiction. It is therefore no record.

The COURT (THRUSTON, J. absent,) gave judgment for the defendant upon the demurrer ;•

1. Because, as the record set forth in the declaration, was not the foundation of the action, but was only matter of conveyance or inducement, the plea of *nul tiel record* was not an answer to the whole count ; for the count avers letters of guardianship, and makes a profert of them ; and *non constat*, that Ritchie was not guardian, although not appointed by the Orphans' Court, as is supposed to have been stated in the record set forth in the declaration ; and notwithstanding the issue on the plea of *nul tiel record*, if it had been pleaded, might have been found for the defendant, the plaintiffs would not have been precluded from showing that Mr. Ritchie was guardian by other means.

2. Because *nul tiel record* is not a good plea where the record is "showed forth ;" but the defendant may deny the operation thereof ; namely, that the record does not show the appointment. Com. Dig. Pleader, 2 W. 13 ; *Young v. Pennington*, Hard. 158 ; System of Pleading, 368, 369 ; *Eden's case*, 6 Co. 16, (b), and Co. Lit. 260, (a), says, "If a grant, by letters patent under the great seal be pleaded and showed forth, the adverse party cannot plead *nul tiel record* ; for that it appears to the court that there is such a record ; but inasmuch as it is in the nature of a conveyance, the party may deny the operation thereof ; therefore he may plead *non concessit*, and prove in evidence that the king had nothing in the thing granted, or the like ; and so it was adjudged."

3. Because *nul tiel record* is not a necessary plea where the record is not the foundation of the action.

4. Because the record recited in the declaration does not purport to be an appointment of Mr. Ritchie, as guardian, and therefore the plea that he never was guardian, does not conflict with that record. The record only seems to take it for granted that he had been before appointed in some way not stated ; per-

 Lowe v. McClery.

haps by the infant himself. It is only an order that an existing guardian should give bond and security.

UNITED STATES v. NEGRO MARGARETT HOLLAND, and THE
UNITED STATES v. NEGRO LOUISA HOLLAND.

If two be separately indicted for the same theft, and one be convicted, it is necessary for the United States, upon the trial of the other, to prove that it was a joint theft, and that both were present at the act of taking the goods; but it is not necessary to charge in the indictment that the theft was joint; they may be indicted jointly or severally, as both are principals; if there be a doubt as to one whether he were present, he must be acquitted upon an indictment charging him as principal.

NEGROES Margaret Holland and her daughter, Louisa Holland, were indicted separately for the same theft. Neither of the indictments mentioned the participation of the other in the crime. The jury first found Margaret, the mother, guilty. Afterwards, upon the trial of Louisa, *Mr. Wallach*, for the prisoner, prayed the Court to instruct the jury that they could not find her guilty, unless they should be satisfied, by the evidence, that it was a joint theft, and that both were present at the act of taking the goods.

The COURT (*nem con.*) gave the instruction as prayed. It was then suggested by the prisoner's counsel, that she could not be convicted upon this indictment, because it did not charge her with jointly stealing the goods; the other prisoner, Margaret, having been convicted of the same theft.

But the COURT (*nem con.*) inclined to think, and so decided, that it was not necessary to charge in the indictment that the theft was joint, as neither of them was more or less guilty because they were together. Both were principals. 1 Chitty, Cr. 260, (214,) 267, (220,) 271, (223,) 2 Hale, 173, 174.

The jury found Louisa, also, guilty.

There seemed to be some doubt whether Margaret was actually present at the taking of the goods; and the Court granted her a new trial, upon which *Mr. Key*, for the United States, entered a *nolle prosequi*. The other prisoner, Louisa, was sentenced to be whipped fifteen stripes, and to pay a fine of \$1, and costs.

LLOYD M. LOWE v. JAMES MCCLERY.

A check drawn by the defendant in favor of the plaintiff, or bearer, with the bank's cancelling mark upon it, and produced by the defendant, is not evidence of money

King v. Fearson.

paid to the plaintiff, although it appear by the plaintiff's evidence, that when payment was demanded, the defendant said he had paid it by such a check, and although he produces his own check-book, with a memorandum corresponding with the check, with the additional words "for rent."

ASSUMPSIT for use and occupation.

Upon the trial it appeared by the plaintiff's examination of his witness, that when demand of the rent was made, the defendant said he had paid it by a check on the Office of Discount and Deposit, on the 9th of August. *Mr. Key*, for the defendant, offered in evidence such a check on the Office of Discount and Deposit, with the bank's cancelling mark upon it, payable to the plaintiff or bearer, and the defendant's own check-book, with a margin corresponding with the check in amount, name, and date, and the words "on account of rent."

Mr. Key contended that the circumstance that the plaintiff's witness had testified that the defendant said he had paid the rent by such a check would justify the admission of the check in evidence.

But the COURT (*MORSELL, J. contra*;) refused to admit the check in evidence.

MORSELL, J. was of opinion, that it might be given in evidence to corroborate the defendant's declaration, and to rebut the presumption which might arise from the defendants not producing the check.

Verdict for plaintiff \$57.15. Motion for new trial overruled.

EDWARD B. KING v. SAMUEL S. FEARSON.

Trover against the owner, will not lie by a bailiff who distrains goods for rent, and leaves them on the premises of the owner, who takes them away.

TROVER for cord-wood, which had been distrained by the plaintiff, as bailiff of the Bank of Columbia, for rent due to the bank, and left upon the premises, namely, on the defendant's wharf, and removed by the defendant.

Upon the trial at May term, 1827, *Mr. R. P. Dunlop*, for the defendant, objected that trover would not lie against the general owner, by a bailiff who has distrained the goods for rent; and cited *Wheaton's Selwyn*, 1055. The bailiff has no property in the goods or such right of possession as will maintain trover against the general owner. *Bradby on Distress*, 1, 13, 223.

Mr. J. Dunlop, contra, that the right of possession was suffi-

Rhea v. Rawlings and Son.

cient to maintain trover, cited 2 Saund. 47, note a; *Cross v. Glode*, 2 Esp. N. P. C. 575.

The COURT with some hesitation overruled the objection, but intimated that if the verdict should be against the defendant, they would hear a motion for a new trial.

Verdict for the plaintiff, \$75.

Upon the motion for a new trial, *Mr. R. P. Dunlop* cited 6 Bac. Ab., tit. Trover, E; Stark. on Ev. part 4, p. 1482.

Mr. J. Dunlop, contra, cited *Wilbraham v. Snow*, 1 Vent. 52.

CRANCH, C. J., delivered the opinion of the COURT, (THRUSTON, J., absent.)

In 2 Wheaton's Selwyn, 1055, b. it is said that trover will lie by a sheriff against a person who takes away goods, which have been seized by the sheriff in execution, before they are sold. *Wilbraham v. Snow*, 2 Saund. 47; *Barker v. Miller*, 6 Johns. Rep. 195. But a landlord who has distrained goods cannot maintain trover for them; for he had, at common law, a power to detain the goods as a pledge only, and although, by statute, he is authorized to sell, yet he has not any property. *Moneaux v. Goreham*, 2 Selw. N. P. 1335. And it is stated in Wheat. Selw. 1050, and Stark. on Ev. part 4, p. 1481, that property, either absolute or special, is necessary to maintain trover. Possession, with claim of property, is *prima facie* evidence of property against a stranger having no color of right, (Wheat. Selw. 1056,) but neither possession nor special property will maintain trover against the general owner. Stark. part 4, p. 1482, 1488. *Holliday v. Camrell and White*, 1 T. R. 658.

We are therefore of opinion that a new trial ought to be granted, or a *non-pros* entered.

RHEA v. RAWLINGS AND SON.

The name "Rawlings and Son," is too uncertain to maintain an action.

APPEAL from a justice of the peace. The judgment of the justice was in favor of "Rawlings and Son."

Mr. Lear, for the appellant. The parties ought to be known. "Rawlings and Son" is too uncertain a description of the plaintiffs. In whose favor shall judgment be entered? *Barney v. The Corporation*, [1 Cranch, C. C. 248.]

The COURT (THRUSTON, J. *contra*;) reversed the judgment because the party plaintiff was not named in the proceedings.

Mandeville and Larmour v. Cookenderfer.

TENCH RINGGOLD, for the use of Robert Boone v. SAMUEL BACON.

In an action upon a replevin-bond, it is competent for the defendant, in mitigation of damages, to show title to the property in the plaintiff in replevin, and the plaintiff may rebut such evidence, by showing that the deed, under which the plaintiff in replevin claimed title, was fraudulent and void.

ACTION of debt upon a replevin-bond, given by one Hardin, who replevied the goods which had been seized by the present plaintiff, Tench Ringgold, marshal of the District of Columbia, upon a *fiery facias* at the suit of Robert Boone, against one Charles J. Queen. The defendant, Samuel Bacon, was one of Hardin's sureties in the replevin-bond. The breach assigned was, that Hardin, the plaintiff in replevin, did not prosecute his writ with effect, having been *non-prossed* upon a rule to declare.

Upon the trial of this action upon the replevin-bond, *Mr. Wallach* and *Mr. Jones* for the defendant, in mitigation of damages, offered evidence that Hardin the plaintiff in replevin, was the owner of the goods replevied; and cited *McDaniel v. Fish*, in this Court, at December term, 1818, [2 Cranch C. C. 160.]

Mr. R. P. Dunlop, contra, cited *Pye v. Wood*, 3 Har. & J. 504; that, in debt on a replevin-bond, the defendant cannot give in evidence, in mitigation of damages, the worthlessness of the property replevied.

Mr. Wallach, in reply, cited *Wood v. May*, in this Court at the last term, [*ante*, 172.]

The COURT (THRUSTON, J., doubting,) said, that as this matter, if pleaded to this action, would not be a bar, it may be given in evidence, in mitigation of damages, in this case, although it would have been a bar to the avowry, if it had been pleaded in the action of replevin.

Mr. Key, for the plaintiff, then offered evidence to prove that the deed, under which Hardin, the plaintiff in replevin, claimed title to the goods, was fraudulent and void, and that one Richard T. Queen, held the property in trust for Charles J. Queen, as whose goods the marshal had seized them in execution, at the suit of Robert Boone. *Deady v. Harrison*, 1 Starkie's Rep. 50.

The COURT (*nem. con.*) permitted the evidence to be given.

Verdict for plaintiff \$352.37 with interest from 28th December, 1824.

MANDEVILLE AND LARMOUR v. THOMAS COOKENDERFER.

The keeper of a stage-office is liable to the owner of a colored slave, for damages sus-
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tained by the running away of the slave, if he suffers him to take passage and depart in the stage-coach, without the consent of the owner.

Color is *primâ facie* evidence of slavery.

Every person, who undertakes a business in which the public is concerned, is bound by the general law of the land, to conduct that business with reasonable care; and if, for want of such care in such business, another person suffer damage, the conductor of such business is liable to make good such damage.

Every negro is, by a rule of evidence well established in this part of the country, *primâ facie*, to be considered as a slave, and the property of somebody; and he who acts, in respect to him, as if he were a free man, acts at his peril; and the burden of proof is on him to show that the negro is not a slave; or at least to show such circumstances as will rebut the presumption arising from color.

If the keeper of a public stage-office send a negro away in the stage-coach, it is *primâ facie* evidence of carelessness.

In such a case it is not necessary to aver in the declaration, any special law or custom, to raise a duty in the office-keeper, not to send away a negro slave without the leave of his master or owner.

Where it is necessary to set forth the duty, the averment must relate to the time of doing the act which is supposed to be a violation of that duty.

The words "wrongfully and improperly" are not alone sufficient to show, that the act to which they are applied, was unlawful or actionable; but the facts and circumstances, which make the act unlawful or actionable, must be set forth.

If there be a general verdict for the plaintiff, and one of the counts in the declaration be bad, the judgment must be arrested; but, if there be a good count in the declaration, a *venire facias de novo*, may be awarded.

THIS was an action upon the case against the keeper of a public stage-office in Washington, for suffering the plaintiffs' slave to take passage in the stage-coach from Washington to Baltimore, whereby the slave escaped; and the plaintiffs were put to great trouble and expense in recovering him.

At the trial, in May term, 1827, the Court (*nem. con.*) at the prayer of the plaintiffs, instructed the jury in effect, that color was *primâ facie* evidence of slavery; and that if they should be satisfied by the evidence that the plaintiffs' slave was a colored man; and that the defendant, without authority of the plaintiffs, suffered him to take a seat in the stage-coach for Baltimore, and that he went off in the coach, and thereby escaped, the defendant is liable to the plaintiffs in this action for the damages which the plaintiffs may have sustained by reason of such escape.

The jury found a general verdict for the plaintiffs for \$200 damages.

The defendant's counsel moved in arrest of judgment, and contended that the second count was bad.

1. The first count states that the plaintiffs were owners of a negro man, a slave for life, called Richard Bunbury; and that the defendant, on the 28th of September, 1825, was the "keeper and superintendent, and had the management and control of a stage-office, for the entry of lawful passengers, travelling from the city of Washington, in the said county, to Baltimore," &c., "and whereas by the law and the custom of the county aforesaid,

superintendents, keepers, and managers of stage-offices, are bound not to take any slave for life, belonging to any citizen or citizens of said county, out of the same, or to take any such slave or slaves, out of the district aforesaid, in any stage, carriage, or other vehicle, or in any wise to suffer or permit, or aid in suffering or permitting any such slave or slaves, to have passage or conveyance in any line of stages, coach, stage or other conveyance under their or his control, management or superintendence, by or through which any such slave or slaves, may be carried out of the district aforesaid, without proper permission or authority from the owner of such slave or slaves; yet the said Thomas Cookenderfer," (the defendant) "not regarding his duty in that behalf," &c. "took so little and such bad care of, and conducted himself so carelessly and improperly in the management of the said line" "of stages," "and the office of such stages, line, in the said county, that the said" "slave" "was by and through the carelessness, misdirection, mismanagement, and improper conduct of said defendant, permitted, suffered, and allowed, and by him unjustly authorized and enabled to take a seat and passage in the said line of stages, or one of the stages of the said line on the 28th of September, in the year 1825, at the county aforesaid, and the said" "slave" "to be therein and thereby carried, and taken out of, and beyond the county and district of Columbia, aforesaid, and out of, and from the control of the said plaintiffs, and thereby caused the said plaintiffs to pay" &c., a large sum of money, namely, \$500, for recovering him, and to lose his services, &c.

2. The second count, "and whereas the said defendant Thomas Cookenderfer, was, on the 28th day of September, in the year 1825, at the county aforesaid, the keeper of the stage-office, for the line of stages which runs to and between, and on the route to and between, the city of Baltimore in the State of Maryland, from the city of Washington, in the county of Washington, and had, on the day and year aforesaid, and at the county aforesaid, the control and management of the same, and the superintendence of passages taken and entered on the books and way-bill, for and in the said line, route, and stages, from said city of Washington, and it is his duty as such superintendent, not to permit or suffer, or in any wise aid any slave for life, owned by any citizen or citizens, in said county and district, or any such slave owned by any citizen or citizens within said district, to make and effect his escape from the ownership, control of, or servitude to his lawful master or masters, by means of, or through the said stage-line, or stage-office, or by, or in any manner or mode of conveyance, under and within his control, as superintendent of

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such line of stages, or stage, belonging or connected to, or with the said line or route, or office. Nevertheless the said Thomas not regarding his duty aforesaid, wrongfully and improperly, did, on the 28th day of September, in the year 1825, at the county of Washington aforesaid, suffer and allow, and give permission to, and aid the said negro slave, Richard Bunbury, the property, before and at that time, of said plaintiffs, to take passage and conveyance in the said line or route of stages, or one of the stages of the said line or route, from Washington city, in the county of Washington, to, or on the route to Baltimore, in the State of Maryland, and to be therein conveyed and carried out of the district and county aforesaid, and out of the reach and control of said plaintiffs, whereby the said plaintiffs lost, and were deprived of the use, labor, services, and profits of the said slave," &c., "and also caused the said plaintiffs to pay," &c., "money for the recovery of said slave," &c.

Mr. Morfit and Mr. Swann for the plaintiffs.

Mr. Key for the defendant.

CRANCH, C. J. (THRUSTON, J., absent.)

It is moved in arrest of judgment, that one, if not both counts of the declaration are bad; and as the verdict is general, if either count be bad, the judgment must be arrested.

The first count sets forth the law and custom of the county of Washington, in relation only to the slaves of citizens of that county; and as the count does not aver the plaintiffs to be citizens of that county, the case is not within the law and custom set forth; and therefore the plaintiffs' case derives no support from that allegation. But the averment of the law and custom of the county may be considered as surplusage; and if, without that averment, there be enough left in the count to make the defendant liable, the count may be good.

The count avers that the defendant was, at the time, &c., the keeper, and had the management and control of the stage-office of a line of stages for passengers passing in such stages from Washington to Baltimore; that the defendant, not regarding his duty in that behalf, took so little care of, and conducted himself so carelessly and improperly in the management of his said office that the plaintiffs' negro slave, the property of the plaintiffs, was by the carelessness, misdirection, and mismanagement of the defendant, permitted, suffered, and allowed, and unlawfully and unjustly authorized, and enabled to take a seat in one of the stages of that line, and to be thereby carried and taken out of the District of Columbia, and out of the control of the plaintiffs, whereby they sustained damage.

Every person who undertakes a business, in which the public

is concerned, is bound, by the general law of the land, to conduct that business with reasonable care; and if, for want of such care in such business, another person suffer damage, the conductor of such business is liable to make good such damage. If the keeper of a stage-office carelessly send away my goods, without my authority, or send them in a wrong direction, so that I suffer damage through his carelessness, he is liable to make compensation for my loss, although he did not know the goods to be my property. Every negro is, by a rule of evidence well established in this part of the country, *primâ facie* to be considered as a slave, and the property of somebody; and he, who acts in regard to him as if he were a free man, acts at his peril, and the burden of proof is upon him, to show that the negro is not a slave, or, at least, to show such circumstances as will rebut the presumption arising from color. If the keeper of a stage-office, therefore, send a negro away in the stage-coach, it is *primâ facie* evidence of carelessness. In such a case, I do not think it necessary that the plaintiff should, in his declaration, aver any special law or custom, to raise a duty in the office-keeper not to send away a negro slave, without the leave of his master or owner.

After striking out of the present count the averment of the special law and custom of the county of Washington, I think there is enough left in the count to maintain the action.

In the second count, the duty of the defendant, the violation of which is the subject of complaint, is averred to be a duty existing at the time of the complaint, not at the time of the act of sending away the slave. The plaintiffs' case is, therefore, not aided by that averment; and if there be not enough left in the count to show a duty on the part of the defendant, the plaintiffs cannot recover on that count. If that averment be stricken out, the substance of the count is. That the defendant was, on the 28th of September, 1825, the keeper of the stage-office, &c., and had the control and management of the same, and of the passages taken, &c. Nevertheless, the said Thomas Cookenderfer (the defendant) wrongfully and improperly did, on the 28th of September, 1825, at, &c., "suffer and allow, and give permission to, and aid the said negro slave, Richard Bunbury, the property, before and at that time, of the plaintiffs, to take passage in one of the stages," &c., "and to be therein conveyed and carried out of the district aforesaid, and out of the reach and control of the plaintiffs, whereby the plaintiffs lost the service of the said slave," &c., "and sustained damage," &c.

This count does not aver negligence, or carelessness of the defendant, in his office or business; nor that the aid given to the

slave, was knowingly, or unlawfully given, nor without the consent of the owners; nor does it show any cause of action, unless the words "wrongfully and improperly" can be considered as a sufficient averment of the wrong. But these epithets have never been considered of themselves, as sufficient to show an act to be unlawful, or actionable, which would not appear to be so without those epithets. All the circumstances must be shown, that cause the act to be unlawful, so that the Court may judge whether it be unlawful or not.

I am therefore of opinion, that the 2d count is bad, and not aided by the verdict; and, therefore, that the judgment must be arrested.

MORSELL, J. concurred.

After this opinion was given, *Mr. Morfit*, for the plaintiffs, as there was one good count, moved for a *venire de novo*, *Mr. Key* objected, and questioned the power of the Court to grant it after judgment arrested. If it be a matter of discretion, the Court will not grant it in so hard a case. The suit ought to have been brought against the stage-owners, not against their office-keeper.

Mr. Morfit cited the case of *Semmes v. Sherburne*, in this Court, at December term, 1824, [2 Cranch C. C. 534,] and December term, 1825, [Id. 637,] and *Turner v. Foxall*, in this Court at June term, 1819, [Id. 324,] in which cases, he says, this Court ordered a *venire facias de novo*; but it does not appear in the report. *Mr. Morfit* also cited *Eddowes v. Hopkins*, Doug. 76, and *Grant v. Artle*, Doug. 730, 2 Tidd, 831, and *Harwood v. Goodright*, Cowp. 89. But see *Trevor v. Wall*, 1 T. R. 151; a court of error cannot award a *venire de novo*; *Holt v. Scholefield*, 6 T. R. 694, 695, where the Court refused a *venire de novo*, in slander, and *Lawrence*, J. said, "that the plaintiff ought not to be at liberty to award by this judge's notes in the case, because the evidence applied as well to the bad as to the good counts." *Harrison v. King*, 1 B. & A. 161; *Holloway v. Bennet*, 3 T. R. 448; *Lee v. Muggeridge*, 5 Taunt. 36; 1 Arch. K. B. Practice, 195; *Anger v. Wilkins*, Barnes' notes, 478; *Smith v. Haward*, Barnes, 480; *Williams v. Breedon*, 1 B. & P. 329; *Spencer v. Goter*, 1 H. Bl. 78.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows:

The judgment in this case having been arrested because one of the counts was bad, and the jury rendered a general verdict for the plaintiffs for \$200 damages, *Mr. Morfit* moved for a *venire de novo*; evidence having been offered upon both counts, and cited *Eddowes v. Hopkins*, Doug. 376; and *Grant v. Artle*, Doug. 722, 730.

Mr. Key, contra, cited Chitty on Pleading, 394; 2 Saund. 171 b.; Starkie on Slander, 418, 419; *Hopkins v. Beedle*, 1 Caines, N. Y. T. R. 347; *Lyle v. Clason*, 1 Caines, 581; *Livingston v. Rogers*, 1 Caines, 588; *The Queen v. Helston*, 10 Mod. 202, 203; *Beale v. The Bank of New York*, 1 Johns. Rep. 535, 555, 576; *Morgan v. Bliss*, 2 Mass. Rep. 112; and contended, that the general rule is, that a *venire de novo* cannot be granted on account of a general verdict for the plaintiff, where some counts are good, and others bad; and that the case of slander is an exception to that general rule.

Chitty, in the page cited, (namely vol. 1, 394,) says that in such case, "the judgment will be arrested *in toto*, and no *venire de novo* awarded;" and for this he cites *Onslow v. Horne*, 3 Wils. 185; 2 Saund. 171, d, and *Grant v. Artle*, Doug. 722, 730.

In the case of *Onslow v. Horne*, which was an action of slander, no question was made respecting a *venire de novo*; and the Court expressly waived the question whether either of the counts was good. The only question was, whether one of the two counts upon which the verdict was given, was a bad count; for if so, it was admitted that the judgment must be arrested. The Court, being of opinion that one of the counts was bad, arrested the judgment. No motion was made for a *venire de novo*. Why it was not made does not appear; perhaps it was because the counsel for the plaintiff doubted whether either event was good; or it might be, that, with Mr. Starkie, he thought the action of slander was an exception to the general rule that where judgment is arrested because the verdict is general, and some counts are bad, and some good, and evidence has been given upon any of the good counts, a *venire facias de novo* will be awarded.

The case however is not authority to show that in such case the general principal is, that a *venire facias de novo* cannot be awarded in any form of action. It may be observed, however, that Mr. Chitty does not say that the court cannot, but that it will not, grant a *venire de novo* in such a case; evidently alluding to the will or discretion of the Court, and not to its power.

The next authority to which Mr. Chitty refers is, 2 Williams's Saunders, 171, b, in the notes, where Sergeant Williams says, that in such case the judgment shall be arrested and no *venire de novo* awarded; for which he cites *Trevor v. Wall*, 1 T. R. 151; *Hancock v. Haywood*, 3 T. R. 435; and *Holt v. Scholefield*, 6 T. R. 691. He admits, however, that where evidence has been given only on the good counts, the court has permitted the verdict to be amended by the judge's notes; for which he cites *Eddowes v. Hopkins*, Doug. 376; *Williams v. Brudon*, 1 B. & P. 329; and *Spencer v. Goter*, 1 H. Bl. 78.

The case of *Trevor v. Wall*, 1 T. R. 151, was error on a judgment of an inferior court, in Shropshire, in an action of assumpsit. The judgment was reversed because one of the counts, (namely, for money had and received,) did not state that the money was had and received within the jurisdiction of that court. The defendant in error contended, that if the judgment should be reversed for that error, the court would award a *venire de novo*; but the court said, "there is no instance of a court of error granting a *venire de novo*, when the proceedings originated in an inferior court; and the reason for that decision is very strong; for the judgment was reversed, because it did not appear that the court had jurisdiction of one of the causes of action for which the damages were given; and it would be absurd to direct the court below to try again a cause of which they had not jurisdiction. However that may be, the reason given for refusing it, shows that the case was an exception to the general rule, and that if it had not been a judgment of an inferior court, a *venire de novo* might have been granted.

So far is that case from supporting the principle which it is adduced to support, that it is a strong case in opposition to it.

The case of *Hancock v. Haywood*, 3 T. R. 435, was an action of assumpsit, and is cited by Mr. Chitty, only for the *dictum* of Judge Buller, that, "on a writ of error, where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given." No question was made as to a *venire de novo*. The case of *Holt v. Scholefield*, 6 T. R. 691, was an action of slander, and does not fix any general principle, unless it be that in actions of slander, the court has a discretion to grant or refuse a *venire de novo* where one count is bad, and the verdict for the plaintiff is general. The words of the reporter are, "The court were of opinion that there should not be a *venire de novo*; and that, as the damages were entire, the judgment must be arrested *in toto*." And the reason stated by *Lawrence, J.*, why the plaintiff was not permitted to amend the verdict by the judge's notes, was, that the evidence applied as well to the bad counts, as to the good counts. If this case is to be considered as deciding that the court cannot grant a *venire de novo* in an action of slander, where there is a bad count, and a general verdict for the plaintiff, still it does not establish a general principle, but an exception to a general principle. If it is to be considered only as a particular instance of the exercise of the discretion of the Court, it is an admission of the power of the Court to grant the writ in such a case.

The case of *Eddowes v. Hopkins*, Doug. 376, was an action of

assumpsit, and is cited by Mr. Chitty, to show that the verdict may be amended by the judge's notes, where some of the counts are bad, or inconsistent, and the verdict for the plaintiff has been general. In that case, Buller, J., said, there was this distinction: that if there was evidence, at the trial, upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts; but that if there was any evidence which applied to the other bad or inconsistent counts (as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *postea* could not be amended because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them: That in such a case the only remedy is by awarding a *venire de novo*. He mentioned a case where Sir Fletcher Norton had moved for and obtained a *venire de novo* in a case of that sort." "The rule for amending the verdict was made absolute, and the rule to arrest judgment was discharged."

The report refers to the case of *Anger v. Wilkins*, Barnes, 478, in which a *venire de novo* was granted, "according to an ancient rule of court," "that plaintiff might sever his damages." The same point was also decided in the next year, in the case of *Smith v. Howard*, Barnes, 480.

The case of *Williams v. Breeder*, 1 B. & P. 329, was an action of trespass. A general verdict was given for the plaintiff upon two counts, one of which was bad; but the verdict was amended by the judge's notes, it appearing that the damages were calculated upon the evidence applicable only to the good count, although some evidence was given on the bad count.

The case of *Spencer v. Goter*, 1 H. Bl. 79, was an action for slander. The court said they could not alter a verdict unless it clearly appeared upon the face of it, that the alteration would be agreeable to the intention of the jury, and that the proper remedy in that case was a new trial. The verdict in that case was contrary to the instruction of the judge.

These are all the cases cited by Sergeant Williams, in support of the position, that "no *venire de novo* will be awarded."

Mr. Chitty also refers to the case of *Grant v. Astle*, Doug. 722, which was error from the Common Pleas, on a judgment in an action of assumpsit. Lord Mansfield, after lamenting the rule that judgment must be arrested upon a general verdict for the plaintiff, if one of the counts be bad, said, "But in civil cases, the rule is now settled, and we have gone as far as we can, by allowing verdicts, in such cases, to be amended by the judge's

notes. That might have been done, in this instance, in an earlier stage of the proceeding, but cannot now after judgment."

Buller, J., "The court may grant a *venire de novo*; a good cause of action is shown in the first count, and that it is true, appears by the verdict; but the plaintiff has also had damages assessed to him on a count in which he has not shown any cause of action. The court, under these circumstances, may send the case back to have damages assessed only on that count on which, in point of law, he is entitled to recover." "The court there said, there was no doubt but a *venire de novo* might be granted by a court of error; that it had been done by the House of Lords, and was not a new practice; for upon inquiry made by this court, in a late case from Ireland, a great many instances had been found." A *venire de novo* was awarded.

These are all the cases cited by Mr. Chitty, in support of the position that a *venire de novo* shall not be granted where the verdict for the plaintiff is general, and one of the counts is bad and the others are good.

The next authority cited by Mr. Key is Starkie on Slander, 418, 419; where, after having stated that judgment will be arrested upon a general verdict for the plaintiff, in an action of slander, if there be one bad count, he says:—"It is said to be the practice in the Court of Common Pleas, to award a *venire de novo* where judgment is arrested in such a case, upon payment of costs, in order that the plaintiff may sever his damages. But in the case of *Holt v. Scholefield*, in the King's Bench, a *venire de novo* was refused. In the case of *Brevor v. Hides*, 2 Wils. 300, Bathurst, J., expressed an opinion, that where the words in one count were not actionable, yet the *postea* might be amended, and a verdict, as to those words, entered for the defendant, upon the judge's certificate that no evidence was given of them at the trial. But Lord Camden said it would be very dangerous, after a verdict of twelve men recorded by the court, to refer to the judge's notes in order to alter it; and he thought there was no precedent of such a case, and that the verdict could not be varied. The general practice, however, is, where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count, though not upon others, either to amend the *postea*, which is done where it clearly appears that no evidence was given upon the defective counts, or by awarding a *venire facias de novo* where such evidence has been given, in order that the plaintiff may ascertain to what damages he is entitled, for so much of his cause of complaint as will support damages. It does not distinctly appear upon what principle actions for slander form an exception to the general rule."

The counsel for the defendant, in the present case, has supposed that the general rule, to which actions for slander form an exception in the opinion of Mr. Starkie, is, that a *venire de novo* will not be awarded where judgment is arrested upon a general verdict for the plaintiff, where one of the counts is bad and others are good.

But it is impossible that that should be the general rule alluded to by Mr. Starkie; because the only case in which a *venire de novo* has been refused, under such circumstances, is a case of slander, namely, the case of *Holt v. Scholefield*, 6 T. R. 691.

If that case established a general rule, it was that a *venire de novo* should not be awarded in actions of slander; it is impossible, therefore, that actions of slander should form an exception to that rule.

But the rule, to which Mr. Starkie thought actions of slander formed an exception, was the "general practice" which he had just mentioned in the preceding sentence, namely, to amend the *postea*, or to award a *venire de novo*. The word "however," in the first line of that sentence, shows that what he is about to say is in opposition to what he had just before related, which was the *dictum* of Lord Camden, that it would be dangerous to alter verdicts by the judge's notes; and the case of *Holt v. Scholefield*, in which a new *venire* was refused in an action of slander, which case, it is clear, Mr. Starkie thought excepted actions of slander from the general rule, notwithstanding the practice which, in such cases of slander, prevailed in the Common Pleas, as stated in the two cases cited from Barnes's notes, 478, 480. The authority of Starkie, therefore, does not support the doctrine of the defendant's counsel, but is very strong against it.

The cases of *Hopkins v. Beedle*, 1 Caines, Rep. 347; *Lyle v. Clason*, 1 Caines, 583; and *Livingston v. Rogers*, 1 Caines, 588, were also cited by the defendant's counsel, to show that the rule for granting a new *venire* is confined to cases of slander; but there is nothing in those cases to justify such an inference. The two first, it is true, were cases of slander; but the third was an action upon *assumpsit*, in which Judge Kent, in delivering the opinion of the court, said:—"As there is one good count in the declaration, the plaintiff may, if he choose, on the first ground sue out a *venire de novo*." In neither of the cases is there the least intimation that the rule is confined to actions for slander.

The cases of the *Queen v. The Corporation of Helston*, 10 Mod. 202; *Beebe v. Bank of N. York*, 1 Johns. 535, 555, 576;

and *Morgan v. Bliss*, 2 Mass. 112, were cited by the counsel of the defendant, to show that a new trial will not be granted for mistake of counsel. But it does not appear to be a mistake of counsel in this case, but an error of the jury, in giving a general verdict. This they had a right to do; and it was not in the power of the plaintiff's counsel to prevent it, unless by withdrawing the bad count, or entering a *nolle prosequi* upon it.

A motion for a *venire de novo* is a motion for a new trial upon matter appearing in the record, and was anciently the only form of moving for a new trial. It is a motion to the discretion of the court, who will not grant it unless they see that the plaintiff has a good cause of action upon the record, and supported by evidence at the trial.

Upon consideration of all the cases cited, we think the general practice is, (as stated by Mr. Starkie,) in all the forms of action, (not excepting the action for slander,) "that where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count though not upon others, either to amend the *postea*, where no evidence was given on the defective counts, or by awarding a *venire facias de novo* where such evidence has been given."

In all the cases the motion is to the discretion of the court, and we see no reason for excluding the action of slander from that discretion; but upon this point it is not necessary, in the present case, to decide.

It has been said in argument that this is a hard case, because brought against the office-keeper, and not against the owners of the coach, who received the benefit of the fare; and therefore the Court, in its discretion, ought not to award a new *venire*.

But if the suit had been brought against the owners, and judgment recovered against them, they might bring their action against the office-keeper, by whose negligence the damage arose; so that a judgment in the present case may prevent circuity of action.

The Court, therefore, will award a new *venire*, upon payment of all costs up to this time.

Venire de novo awarded.

UNITED STATES v. JOHN BROWN.

The person, whose paper is forged, is a good witness for the prosecution.

The following is "an order for the payment of money, or delivery of goods," within the second section of the Maryland Act of 1799, c. 75, namely: — "Mr. E. M. Linthicum will please let the bearer, John Brown, have such articles as he may choose

Barnes's Heirs v. Barnes's Executors.

on my account, to the value of thirty dollars; also twenty dollars in cash, and oblige his friend, Henry Tayloe. For Col. John Tayloe. Washington City, 24th December, 1827."

INDICTMENT for knowingly uttering as true, and with intent to defraud E. M. Linthicum and John Tayloe, the following forged order, namely: —

"Mr. E. M. Linthicum will please let the bearer, John Brown, have such articles as he may choose, on my account, to the value of thirty dollars; also twenty dollars in cash, and oblige his friend, Henry Tayloe. For Col. John Tayloe. Washington City, 24th December, 1827."

The said Henry Tayloe was offered as a witness, to prove that it was not his signature.

Mr. Bradley, for the prisoner, objected that the party, whose name is forged, is not a competent witness for the prosecution. Arch. Cr. Pr. 96.

The COURT (THRUSTON, J., absent,) overruled the objection, and suffered the witness to be sworn and examined.

CRANCH, C. J., mentioned the *Case of Peacock*, in this Court, at December term, 1804, in which Mr. Sloane, a member of Congress, was permitted to testify that the signature James Sloane, upon the forged bill, was not written by him.

Mr. Bradley then objected that the forged paper was not such an order for the payment of money, or delivery of goods, as was intended by the second section of the Maryland Act of 1799, c. 75, and cited 1 Leach, Cr. L. 134; *Williams's case*, 1 Leach, 114; and note to *Lockett's case*, Id. 95.

The COURT (THRUSTON, J., absent,) overruled the objection, on the authority of *Bates's case*, in this Court, in June, 1810, (2 Cranch, C. C. 1); but told *Mr. Bradley* that he might avail himself of it, on motion in arrest of judgment, when the point might be fully considered. *Cur. ad. vult.*

At May term, 1828, the Court overruled the motion in arrest of judgment, and sentenced the prisoner to fine and imprisonment.



BARNES'S HEIRS v. BARNES'S EXECUTORS AND THE CORPORATION OF GEORGETOWN.

A devise in trust, to lay out \$200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans within the Corporation of Georgetown, is void for uncertainty.

The statutes of mortmain are in force in Maryland, but the statute of charitable uses, 43 Eliz. c. 4, is not, and was not when the county of Washington was separated from the State of Maryland.

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If either the object of a legacy, or the person of the legatee or *cestui que trust*, be so uncertain that no one can show a title to claim the legacy, or to enforce the execution of the trust, the legacy and trust are void ; even in case of an executory devise. If it be an executed, not an executory devise, it is void if there be no person competent to take at the death of the testator. An executory devise is void, if it be not necessarily to be executed within a life in being at the death of the testator, or within twenty-one years thereafter.

THIS was a bill in equity by Hannah and Susan Duryee, the heirs of John Barnes, late of Georgetown, D. C., against his executors and the Corporation of Georgetown, to set aside certain legacies and trusts, given and created by his will. The will is dated 12th March, 1825, and the testator died on the 12th of February, 1826.

After providing for the payment of his debts and funeral expenses, manumitting his two negro women, Abigail and Nelly, providing them with an annuity and bequeathing them some small articles, and making a few specific bequests to some of his friends, he devises and bequeathes all the residue of his real and personal estate to his executors, in trust, for the purposes expressed in the will ; with power to sell absolutely, and convey the same, and to invest the proceeds in stocks, at their discretion ; with power again, from time to time, to sell and reinvest, &c., to answer the trusts and purposes of his will, as they should "think best, and most for the advantage of his estate, and the parties interested therein, and the objects contemplated by" him. And further, upon trust, to pay out of the interest and yearly dividends, or produce to arise from his estate, the annuities thereinbefore and thereafter mentioned.

1. He then says : — " 1. And I do will and desire that the sum of \$200 per annum be yearly, and every year forever hereafter, expended by my executors, or trustees for the time being, out of the yearly interest, dividends, and produce of my estate, in wood, meal, and clothing, and that the same may be distributed by them, at the most suitable season of each and every year, amongst the poor and necessitous widows and orphans within the Corporation of Georgetown."

From the preceding items of bequest it will be perceived, "that no provision is made for Hannah and Susan Duryee, the two daughters of my late grandson, George Clinton Duryee ; and I have come to the conclusion of not suffering them, and their stepmother, Hannah Duryee, to partake of my estate, as I had intended they should, and had provided in my will of September last ; first, because," &c., stating his reasons at large.

2. "And should my estate, in the course of a few years, after paying the several stipulated sums and charges hereinbefore made thereon, and all expenses attending the same, be such

as to enable my executors to extend their views and my wishes to an object of great consideration, namely:— It has often occurred to me that the time was not far distant, (indeed it has already become urgently necessary,) when a poor-house, or bettering-house, for this county or town, (it matters not by what name denominated,) should be established; and, if proposed through the honorable and respectable Corporation of Georgetown, I doubt not it would be ultimately successful, and thereby a good foundation would be laid towards perfecting a useful and meritorious work, worthy the enlightened, benevolent, and opulent inhabitants of the district and its vicinity, and the humane at large, of contributing to the comfort and improvement of the suffering objects of such institutions: Whenever any progressive proceedings towards such an end become certain and conclusive, a sum, not exceeding \$1,000, as occasionally wanted and demanded, I freely bequeathe towards its establishment; and I do direct my executors, having regard to the bequests hereinbefore contained, to pay the same to the authorities having power and right to receive the same, for such a purpose.”

3. “And as to the surplus annual proceeds of my estate, which may not be wanted for the purpose aforesaid, I do request my executors, and trustees for the time being, either to suffer the same to accumulate, and to invest the same from time to time, in bank or other stock, or, in their discretion, to distribute the same annually, or otherwise, amongst such of the poor and needy as may be deserving of the same, either in gifts of money or provisions, fuel or clothing, as my executors, or trustees for the time being may think best, and as they may suppose I would myself have given, or disposed of the same, if living.”

4. “And as the establishment of a poor-house, hospital, or bettering-house, for this county or town, is an object very near my heart, I do direct that if my executors, or trustees for the time being, shall, in the exercise of the discretion hereby vested in them, suffer the surplus annual proceeds to accumulate, then I give one other \$1,000 out of such accumulations, in addition to what I have hereinbefore directed to be applied to that purpose, as aforesaid, in further aid of the establishment and maintenance of such poor-house, hospital, or bettering-house; but neither of such bequests is to be paid or applied until my executors, or trustees for the time being, shall perceive that such proceedings have been begun as will render the final accomplishment and completion of the said poor-house or hospital reasonably certain.

“And when the said several annuitants hereinbefore named

shall die, and their said annuities shall sink into my estate and determine, I do hereby direct that my said executors, and trustees for the time being, do and shall stand and be possessed of the whole of the said trust-funds, then unapplied and undisposed of, in trust, to apply and dispose of the whole of the annual proceeds and dividends thereof, in such charities as are hereinbefore mentioned, and so as my desire, as hereinbefore expressed, for and towards the relief of the poor and distressed, and the establishment and maintenance of a poor-house, hospital, or bettering-house may be effected and fully accomplished.

"And I do direct that no part of my estate may be applied to any other than charitable purposes, and to such charitable purposes and objects as I have in this my will named, or as nearly thereto as may be; and that the same purposes may be carried on and continued forever."

After giving \$100 to each of his two executors, Mr. Burnett and Mr. English, and rings to several of his friends, and providing for the expenses of the trust, he says:—

"And in order that the trusts, purposes, and charities of this my will may be perpetuated, and forever kept alive and in being, I do hereby direct that whenever either of them, the said C. A. Burnett or David English, shall die, the survivor do and shall immediately associate with himself some proper and respectable inhabitant of Georgetown, to act with him in the said trusts of this my will, and shall, by proper deeds," &c., "convey and assign the said trust property," &c. "And I do direct that the same course may be taken from time to time, whenever any one of the trustees for the time being shall die," &c., "so that the said trusts and charities may forever be preserved and kept alive, and not fail for want of a trustee or trustees at any time or times hereafter."

Mr. Marbury, for the plaintiffs, contended that the trusts for the distribution of "wood, meal, and clothing among the poor and necessitous widows and orphans within the Corporation of Georgetown," was void for uncertainty, as to the objects of the bounty. So also the two legacies of \$1,000 each, towards "the establishment and maintenance of a poor-house," and the trust to distribute the annual income of the residue of his estate "among such of the poor and needy as may be deserving of the same;" and that the executors held the same in trust for the testator's heirs, and next of kin.

He contended, also, that the English statutes of mortmain are in force, but the statute of charitable uses of 43 Eliz. c. 4, is not in force in Maryland, and in this county; and cited *Morice v. Bishop of Durham*, 9 Ves. 399, 404—406, and 10 Ves. 522, 527,

528, 535, 537, 543; Powell on Devises, 418, 419; *Woodmore v. Woodroffe*, Ambler, 636; *Trippe v. Frazier*, 4 Harris & Johnson, 446; *Dashiel v. Attorney-General*, 5 Har. & Johns. 398; *Baptist Association v. Hart's Executors*, 4 Wheat. 1, 33; *Case of the Charitable School at Hillsborough*, 6 Har. & Johns. 1-4; 4 Com. Dig. 146, Devise, K.

At the time of the death of the testator, the Corporation of Georgetown had no authority to raise money to build a poor-house, or even to support the poor of the town, nor were they bound to support them. It obtained such authority afterward, but that does not help their case. It was necessary that there should be a competent *cestui que trust* at the time of the testator's death. *Baptist Association v. Hart's Executors*, 4 Wheat. 1; Godolphin, 290, § 2; 444, § 4; *Mann v. Mann*, 14 Johns. 13; *The Attorney-General v. Davies*, 9 Ves. 546, 547; *Chapman v. Brown*, 6 Ves. 407, 410, 411; Declaration of Rights of Maryland, art. 3; Landholder's Assistant, 42, § 12; 32 H. 8, c. 1; 34 H. 8, c. 5; 43 Eliz. c. 4; 2 Bl. Com. 375, 376; *Chitty v. Parker*, 2 Ves. Jr. 271; *Pickering v. Stamford*, 3 Ves. 492, 493.

Messrs. Key and Dunlop, for the Corporation of Georgetown, contended that the testator's declaration that the plaintiffs should not have any part of his estate was a disposition of it, so as to exclude them as next of kin. That the statutes of mortmain were only applicable to conveyance of land, and *non constat* that the Corporation of Georgetown would, under this devise, purchase land to build a poor-house upon. That the bequest of funds for that object was not to take effect at the death of the testator, but only when "in the course of a few years" his estate should be such as to enable his executors to extend their views to the object. That in the mean time the corporation, by an amendment of their charter in May, 1826, obtained the power to raise money for the support of the poor, and thereby became competent to receive the legacy. That the trust cannot result to the next of kin contrary to the declared will of the testator. That if one object of the trust fail, the whole will result to any other valid object, by force of the concluding residuary devise. That if the corporation was not competent to take the legacy for the poor-house, yet the Levy Court of the county, whose duty it was to provide for the poor, had a right to receive and apply it, to the exclusion of the next of kin. Powell on Devises, 320, 323, 336, 422. Godolphin, 277.

CRANCH, C. J.

The complainants contend that the charitable trusts, intended to be created by this will are void for uncertainty, and that the

defendants (the executors) are trustees for the complainants (who are heirs at law, and next of kin to the testator,) as to all the property of which the testator died intestate.

1. The first of these charitable trusts, is to lay out \$200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans, within the Corporation of Georgetown.

This trust seems to be admitted by the defendants to be void, under the authority of *Trippe v. Frazier*, 4 Har. & Johns. 446, and *Dashiel v. The Attorney-General*, 5 Har. & Johns. 398, and I am of the same opinion. I think those cases are decisive, that the statute of Eliz. (of charitable uses) is not in force in Maryland; and was not at the time of the separation of this part of the district from that State.

2. The second charitable trust is, that if the testator's estate, in a few years, should be such as to enable his executors to extend their views to a poor-house for the county or town; and any "progressive proceedings towards such an end should become certain and conclusive," he bequeathes "a sum not exceeding \$1,000 as occasionally wanted and demanded, towards its establishment," and he directs his executors "to pay the same to the authorities having power and right to receive the same for such a purpose;" and he, afterwards, in case his executors should suffer the annual proceeds of his estate to accumulate, gives another sum of \$1,000, out of such accumulations, to be applied to that purpose, in further aid of the establishment and maintenance of a poor-house; "but neither of such bequests is to be paid or applied until his executors shall perceive that such proceedings have been begun as will render the final accomplishment and completion of the poor-house reasonably certain."

The Corporation of Georgetown, who are made defendants to this bill, claim these two legacies of \$1,000 each, and contend, that if they were not bound to support the poor of the town at the time of the death of the testator, yet they are now bound to do it, by an alteration of their charter; and, as incidental to that duty, they have power to build a poor-house; and have passed a by-law for that purpose, to which they refer in their answer; and they aver that such proceedings have been begun as render the final accomplishment and completion of the poor-house reasonably certain. The Corporation of Georgetown also claims all the residue of the proceeds of the estate after the death of the annuitants Abigail and Eleanor, on the ground that all the other charitable trusts are void for uncertainty, and the testator has clearly expressed his intention and will to be, that the whole proceeds of his estate should be expended in such charities as

he has named, or as near thereto as may be; and that if some of the trusts are void, the good ones shall take the whole fund.

The Statute of Charitable Uses (43 Eliz. c. 4,) never was in force in Maryland. *Trippe v. Frazier*, 4 Har. & Johns. 446; *Dashiel v. The Attorney-General*, 5 Har. & Johns. 398, 403, and 6 Har. & Johns. 1.

The English decisions, therefore, upon that statute are not applicable to the present case. The peculiar doctrines of the English law in regard to charitable devises, are founded altogether upon that statute. *The Baptist Association v. Hart's Executors*, 4 Wheat. 33 to 48.

This case, therefore, must be decided as an ordinary case of legacy and trust. If either the object of the legacy, or the person of the legatee, or *cestui que trust*, be so uncertain that no one can show a title to claim the legacy, or enforce the execution of the trust, the legacy, or the trust, is void, even in the case of an executory devise.

If the bequest for a poor-house is to be considered as an executed, not an executory, devise, it is void or lapsed, because there was no person competent to take, at the death of the testator. If it be an executory devise, it is also void, because it is not necessarily to be executed within a life in being at the time of the testator's death, or within twenty-one years thereafter. There is no limit to the time of its execution. The trust was to continue forever; and an hundred years might elapse before there should be "authorities having power and right to receive the same for such a purpose," and before "such proceedings shall have been begun as will render the final accomplishment and completion of the said poor-house or hospital reasonably certain." The time may never come, and yet the next of kin will be deprived of the property.

The same reason applies to the trust to dispose of the whole of the annual proceeds of the residue of his estate, in such charities as were thereinbefore mentioned, &c., and I think it is equally void for uncertainty.

I am, therefore, of opinion, upon the whole, that these charitable bequests are all void, and that the complainants are entitled to the relief which they have prayed.

THRUSTON, J., concurred.

MORSELL, J., did not give an opinion.

Decreed, that all these charitable trusts and bequests are void, and that the executors and trustees shall invest \$1,750 in the six per cent. stock of the Corporation of Georgetown, in the names of the executors, to pay the annuities to Abigail and Eleanor, and after their death shall transfer the stock to the complainants,

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and shall transfer all the residue of the estate to the complainants immediately, in equal parts.

No appeal was taken.

HYER AND BREMNER v. HYATT AND WILSON.

No contract of an infant is so absolutely void that it cannot be confirmed and made valid by the infant at full age.

An acknowledgment, after suit brought, will not avail the plaintiff, although made by the defendant after full age.

All contracts by infants are voidable, except for necessities; and even then the plaintiff can only recover the value of the articles furnished; the infant not being competent to bind himself absolutely as to the price.

ASSUMPSIT upon the defendant's acceptance of an inland bill of exchange drawn July 1, 1815, by one Okeley at New York, on the defendants at Georgetown, District of Columbia, for \$645.73 at six months after date, accepted on the 20th of July, 1815. The defendants pleaded severally *non assumpsit*, and the defendant Hyatt, at the trial relied upon his nonage at the date of the acceptance; to rebut which the plaintiff showed by the record in this case, that the defendant, after the commencement of the suit, and after he was of full age, confessed judgment, which was set aside upon the plaintiffs' motion, for irregularity, inasmuch as the other defendant, Wilson, had been taken but had not yet pleaded, and the cause as to him stood upon the imparlance docket, so that the cause as to Hyatt, ought to have been carried back and consolidated with that of Wilson. The plaintiff also relied upon the defendant Hyatt's acknowledgment of the debt in his schedule filed with his petition for the benefit of the insolvent act, after his full age, but since the commencement of this suit.

Mr. Morfit, for the defendant Hyatt, contended that his acceptance of the bill, while under age, was absolutely void (not voidable only,) and was no consideration for a new promise, much less for a mere acknowledgment. That if the acknowledgment amounted to a promise, it was a mere *nudum pactum*. He contended also, that an acknowledgment or promise, after the commencement of the suit, could not support the action of the plaintiff, who must recover, if at all, upon his cause of action as it existed when he commenced his suit. He cited *Davis v. Dodel*, 4 Taunt. 602, and *Pearson v. Hutchinson*, 2 Camp. 211; *Thorn-ton v. Illingworth*, 2 Barn. & Cress. 824.

Messrs. Key and Dunlop, for the plaintiffs, cited *Swasey v. Vanderheyden*, 10 Johns. 33; *Fenton v. White*, 1 Southard, 100; *Whitney v. Dutch and Green*, 14 Mass. Rep. 457; 4 Starkie on Ev. 723, 724.

The jury found a verdict for the plaintiffs, by consent, subject to the opinion of the Court upon the points suggested in the argument of the defendant's counsel, namely: 1. Whether the acceptance of the bill was absolutely void as to the defendant Hyatt, by reason of his nonage, so that a new promise at full age to pay the acceptance would be *nudum pactum*; and, 2. Whether a new promise or acknowledgment, made after the commencement of the suit, would support the present action.

CRANCH, C. J. I am inclined to think that no contract entered into, by an infant, is absolutely void, although all contracts by infants, except for necessities, are voidable.

There are some dicta that contracts made by an infant to his prejudice, are void, not voidable; but I doubt whether, in law, there be any difference as to validity, between those which are beneficial, and those which are prejudicial to the infant; both are voidable, but neither is absolutely void.

There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult, upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant, is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract.

In *Baylis v. Dinely*, 3 Maule & Sel. 477, it was held by the Court of K. B. that a bond by an infant in the penalty of £100 to pay £50 with interest was clearly, upon the face of the instrument, to the prejudice of the infant, and that it could not be confirmed by parol so as to give it effect.

The action, in that case, was upon the bond. Plea, infancy. Replication, that the defendant, after full age, "assented to, ratified and confirmed the said writing obligatory." Demurrer, and joinder; and judgment for the defendant on the demurrer. The Court did not say that the bond was absolutely void; but that it could not be set up as a bond, by a parol confirmation. In the argument of the case, Campbell, for the defendant, contended that the bond was void *ab origine* and could not be ratified in any way. He cited Com. Dig. tit. Infant, c. 2; Bac. Ab. Infancy, 1; Bul. N. P. 182; *Ayliff v. Archdale*, Cro. Eliz. 920; *Delavel v. Clare*, Noy, 35; *Edmunds v. Burton*, cited in *Stone v. Wythipol*, Cro. Eliz. 127, and *Thompson v. Leach*, 3 Mod. 310.

The 1st case cited by Comyns (C. 20,) is *Lane v. Cowper*, Moore, 105, (7 Eliz.) which case was several times argued, and at length by all the judges in bank openly. The 7th question

was, "Whether the lease of an infant, without rent reserved, be void, or voidable; and they all, except Gawdy, agreed that it is void, because there is no consideration; but if rent had been reserved, it would have been only voidable. So a feoffment made with the proper hand of an infant, is only voidable: and they said that any stranger might take advantage of this," (that is, the want of consideration) "by way of allegation, evidence or otherwise."

2. The 2d authority cited by Comyns is Perkins, (Grant, 13,) who says, "That all gifts, grants, or deeds made by an infant, which do not take effect by delivery of his hand, are void. But gifts, grants, or deeds made by an infant by matter in deed or in writing, which take effect by delivery of his hand, are voidable by himself and his heirs, or by those which shall have his estate. And therefore, if an infant make a deed of feoffment, and a letter of attorney to a stranger, to make livery of seizin, and he makes livery of seizin by force thereof, he shall be taken for a disseizor. And if an infant, being seized of a curve of land, grant a rent-charge to be issuant out of the same curve, by deed, and the grantee distrain, he shall punish him as a trespasser, notwithstanding that the infant did deliver the deed with his own hand. But in such case, the infant, nor his heir, nor his feoffee, cannot, against such a deed in pleading, say that he did not grant by the deed; for that the deed is not void, but voidable; as to say that the grantor was within age, &c. at the time of the grant, &c." "And an infant shall be bound by all acts done by him, during his nonage, which acts are for his advantage, unless in some special cases." See Perkins, Grant, 12, 13, 14.

3. The 3d authority cited by Comyns is *Thompson v. Leach*, 3 Mod. 310. The question in that case was, whether a deed of surrender, by a person, *non compos mentis*, was absolutely void as against the remainder-man, so as to destroy the intermediate estate which was to support the contingent remainder; or whether it was voidable only by himself and his heirs. "It was likened to the case of infancy;" and the court said, "There are express authorities that a surrender by an infant is void." *Lloyde v. Gregory*, Cro. Car. 502. "If an infant grant a rent-charge out of his estate, it is not voidable, but *ipso facto* void; for if the grantee should distrain for the rent, the infant may have an action of trespass against him." "In all these cases which have been cited, where it is held that the deeds of infants are not void, but voidable, the meaning is, that *non est factum* cannot be pleaded, because they have the form, though not the operation of deeds, and therefore are not void upon that account, without showing some special matter to make them of no efficacy.

Therefore, if an infant make a letter of attorney, though it is void in itself, yet it shall not be avoided by pleading *non est factum*, but by showing his infancy. Some have endeavored to distinguish between a deed which gives only authority to do a thing, and such which conveys an interest by delivery of the deed itself, that the first is void, and the other voidable; but the reason is the same to make both void; only where a feoffment is made by an infant, it is voidable because of the solemnity of the conveyance."

4. In the case of *Lloyde v. Gregory*, cited above from Cro. Car. 502, "all the court held that a surrender of an infant cannot be by deed, but it is absolutely void; and that a surrender, by acceptance of the second lease, is void because it is without increase of his term, or decrease of his rent; and where there is not an apparent benefit, or the semblance of a benefit, his acts are merely void; and here is no benefit nor appearance of any to the infant, for he hath no manner of advantage thereby, but cause of quarrelling, by this lease." But see *Zouch v. Parsons*, cited below, and Bac. Ab. by Gwillim, tit. Infancy and Age, I. 1, 2, 3, &c. See also the following cases;

Monning v. Knappe, 1 Roll. Ab. 18, l. 50. If an infant enter into an obligation to pay a certain sum of money, and the obligee bring debt upon the obligation, and procure a *latitat* to arrest him, and the obligor being of full age, and knowing this, say to the obligee, that if he would not arrest him, he will pay the money, this is no consideration to maintain the action, inasmuch as the infant might have avoided the obligation by plea.

Hill v. Whittingham, 1 Roll. Ab. 729, l. 15. If an infant be a mercer and buy goods to sell again, he is not chargeable upon the contract.

Williams v. Harrison, Carthew, 160. So if he give a bill of exchange.

Manby v. Scott, 1 Mod. 137. Judge Hide's dictum cites 21 H. 7, 39; 26 H. 8, 2. If an infant give or sell goods and deliver them with his own hand, he shall have no action of trespass against the donee, or vendee, by reason of the delivery; but if an infant give or sell goods, and donee or vendee takes them by force of the gift or sale, the infant may have an action of trespass against him.

Bro. Ab. Coverture and Infancy, pl. 1. "*Nota per curiam*; if an infant grant an advowson by his deed, and at full age confirm the same grant, yet it is of no value, for the first grant was void. But if he give goods, and deliver them with his own hands, trespass does not lie. The same law of feoffment, and livery by the infant himself, and not by attorney, it is voidable and not void. Note the diversity; and so see that the delivery of the deed of an

infant is not like the delivery of land or goods by him. 26 H. 8, 2."

Br. Ab. Coverture and Infancy, pl. 26. "Vide tit. Trespass. The gift of an infant is void; and yet if he deliver the goods to the donee, this is a good excuse in trespass; contrary if the donee take them by virtue of the gift: and the law appears to be the same where the infant makes a feoffment, and makes livery in person. *E contra*, if he make a letter of attorney to make livery, who does it, trespass lies. 22 H. 6, 3."

Id. pl. 28. "Debt. Per Brudnel: If an infant make an indenture, and at full age bind himself to perform it, he shall not avoid the indenture. And if an infant sell a horse for £10, and bring debt for the £10 at full age, he shall not avoid the contract; and the law is the same if he make a lease, reserving rent, within age, and accept rent at full age. 14 H. 8, 29."

Id. pl. 12. "*Dum fuit infra ætatem* was brought of a rent, (tit. *Dum fuit infra ætatem*, 1,) and so see that the grant of an infant is not void, as it is there admitted; and by Kirton, if an infant within age, seized of rent, purchase the land, &c. and aliene the land within age, he shall have election, whether he will demand the land or the rent; which was not denied. 46 E. 3, 33, 34."

Br. Ab. tit. *Dum fuit infra ætatem*, 1, referred to as above. "The writ of *Dum fuit infra ætatem* was brought of land and rent, against the alienee of the father of the demandant. And note here, that the writ was admitted to lie of the rent; and yet some say that the grant of an infant is void, and not voidable; which is not so, as is here apparent; for then action would not lie; and also the delivery of the deed cannot be void, but voidable. 46 E. 3, 34."

Bro. Ab. tit. Coverture and Infancy, pl. 40. "*Mort d'ancestor*." "It was clearly held that a release by an infant of all his right in land, of which he was never seized, is void, so that another who is of the half-blood, shall have the land as heir of their common ancestor, if he who released, die without issue; but otherwise it is said of a feoffment: the reason of which diversity seems to be the livery of the land: this is only voidable, the other is void. 34 Ass. pl. 10."

Bro. Ab. tit. Trespass, pl. 338. "Per Brian and Littleton, justices. If an infant lease his land for years, where there is no livery, and the lessee enter, the infant shall have trespass without reëntry, for it is void as to the infant, where there is no livery. And where he sells his goods, he may elect to have debt upon the sale, or debt for the rent reserved upon the lease, or to have trespass for the land or goods, for it is void at his election. But where the infant delivers a horse, or bails goods, trespass does

not lie. And if an infant make exchange, he shall have assize; and *e contrà* if it be by deed and livery of seizin, for there is a livery; and this livery ought to be made by himself; and *e contrà* where it is made by attorney. But where action is brought against an infant, there he may plead nonage. 18 E. 4, 1, 2."

In the case of *Zouch v. Parsons*, 6 Burr. 1803, 1804. The judges were all of opinion that a conveyance made by an infant mortgagee to a third person, at the request of the mortgagor, who had redeemed the property, bound the infant. The court also agreed with Perkins, (§ 12,) that the deeds of infants which do not take effect by delivery of his hand, are void; but that those which do take effect by delivery of his hand are voidable by himself, by his heirs, and by those who have his estate. That there is no difference in this respect between a feoffment, and deeds which convey an interest. The reason is the same. Littleton (§ 229,) says they all serve for nothing, "and may be avoided."

Lord Mansfield, in 3 Burr. p. 1805, says, "an infant, and they who stand in his place, cannot plead *non est factum* and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed; and that plea avoids it by relation back to the delivery. The reason of this is, because it has an operation from the delivery, and not because it has the form of a deed," as stated in *Thompson v. Leach*, 3 Mod. 310.

He says further in p. 1806, 1807, that a lease by an infant by deed, upon which no rent is reserved, is not absolutely void; nor is a surrender by an infant. See also Bac. Ab. by Gwillim, tit. Infancy and Age, I. 1, 2. *Forrester's case*, 1 Sid. 41; *Farnham v. Atkins*, 1 Sid. 446; *Davis v. Manington*, 2 Sid. 109; 2 Roll. Ab. 21, e. 10, Faits, A.; *Ball v. Heskett*, Comb. 381; *Southerton v. Whitlock*, 1 Str. 690; *Whitney v. Dutch*, 14 Mass. Rep. 457; 4 Starkie on Ev. 725.

In *Thornton v. Illingworth*, 2 Barn. & Cress. 824, the action was assumpsit for goods sold to the defendant, for the purpose of trade. Plea, infancy. Replication, that the defendant ratified the contract after he came of age. The question was whether evidence of a new promise, made after the commencement of the action, would support the issue on the part of the plaintiff. The counsel for the defendant were stopped by the court; and in taking the distinction between the plea of infancy and of the statute of limitations, Bayley, J., said, "in the case of an infant, a contract made for goods for the purposes of trade, is absolutely void; not voidable only." "If he makes a promise after he comes of age, that binds him, upon the ground of his taking upon himself a new liability, upon a moral consideration existing

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before; it does not make it a legal debt from the time of making the bargain."

Holroyd, J. said, "Here no ground of action, capable of being enforced in a court of law, existed at the time when the action was brought: there was no foundation upon which the action could rest. The new promise was the sole ground of action, and not the revival of an old one."

Littledale, J. said, "when the statute of limitations is relied upon, an acknowledgment admits the perpetual existence of the debt; and therefore it suffices, whether it is made before or after the bringing of the action. But the contract of an infant, under such circumstances as the present, being void, and not voidable, the promise, in this case, did not prove that any legal cause of action existed at the time when the cause of action was commenced."

The dicta of Judges Bayley and Littledale, that the contract of an infant for the purpose of trade "was absolutely void, not voidable only," are in direct contradiction to the whole current of English decisions. There is not, I believe, a previous case to be found in which such a contract has been decided to be so absolutely void that the infant, when he arrives at full age cannot confirm it; and I am strongly inclined to think, as I have before observed, that no contract by an infant is absolutely void by reason of infancy alone; but that they are all voidable, unless for necessities; and that even on a contract by an infant for necessities, the plaintiff can only recover their value, the infant not being competent to bind himself absolutely as to the prices. Chitty on Bills, part 1, c. 2, p. 20.

In the present case of *Hyer and Bremner v. Hyatt and Wilson*, I am of opinion that the acceptance of the draft by the infant, for a valuable consideration, and his moral obligation to pay it are a good consideration of a new promise made after his full age; but that a promise made after the commencement of the action, (and *à fortiori*, an acknowledgment) cannot be given in evidence, or if given, cannot alone support the issue on the part of the plaintiff.

THRUSTON, J., concurred, and

The COURT upon this last ground, namely, that a promise made after the commencement of the suit, would not support the present action, rendered judgment upon the verdict for the defendant Hyatt.

MORSELL, J., dissented upon the last point.

See *Ford v. Phillips*, 1 Pick. Rep. 202; *Gibbs v. Merrill*, 3 Taunt. 307; *Burgess v. Merrill*, 4 Taunt. 468; 1 Tuck. Bl. Com. 465; *Young & Co. v. Bell and Wray*, at Alexandria, July term, 1806, [1 Cranch, C. C. 342.]

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1828, AT ALEXANDRIA.

ANDREW BARTLE v. GEORGE COLEMAN.

In a suit in equity, for the settlement of the accounts of a partnership consisting of three persons, one of whom is dead, insolvent, his next of kin, or other personal representatives, are necessary parties.

A court of equity will not sustain a suit to compel the settlement of the concerns of partners in a government contract, in the profits of which the agent of the government, who made the contract, was to participate.

THE bill charges that, in 1814, a contract was entered into between the complainant and the government of the United States, for rebuilding Fort Washington; that this contract was made, on the part of the United States, by Ferdinand Marsteller, a deputy quartermaster-general; that, when the contract was made, it was agreed between the complainant, the defendant Coleman, and the said F. Marsteller, that each should receive one third of the profits of the contract; that, when the work was finished and measured, it was supposed that the profits amounted to \$4,500, and the sum of \$1,500 advanced to Coleman, the defendant, for his share; that afterwards frauds to a great amount, were discovered on the part of F. M., by means of the information of the complainant to the department of war, and that great deductions were made from the price of the labor and materials, so that, instead of a profit, the loss upon the concern was \$10,538; one half of which the complainant claims against the defendant Coleman, as Marsteller had died totally insolvent, leaving no personal property nor personal representative. The bill seeks an account and general relief.

The answer of the defendant denied the partnership, but admitted that he was agent for disbursing the money, and entitled to a commission for the same.

Mr. Taylor, for the defendant, contended that the personal

representatives, or next of kin, of F. Marsteller, should have been made parties, as the bill admits him to have been a partner in the profits of the contract. Maddock's Ch. Pr. 148, 154, 155; 1 Har. Ch. Pr. c. 3, p. 76. That the Court ought not to lend its aid to enforce a contract founded in a fraud upon the United States. The fraud is admitted in the bill itself.

Mr. Jones, contra, contended that, as F. Marsteller died insolvent and left no personal representative, it was not necessary that his next of kin should be parties. The solvent partners are liable *inter se*, for the loss by the insolvent partner.

CRANCH, C. J., after stating at large the evidence of the partnership of the defendant in the transaction, said: — We think, therefore, that the fact of partnership between the plaintiff and defendant and F. Marsteller is established.

The next question is, whether the Court can make a final decree, unless the personal representatives be made parties in the cause?

We think we cannot. Mr. Marsteller was equally interested with the plaintiff and defendant in the profit or loss upon the government contract. The interests of his personal representatives are equally affected by the settlement of the account. But even if they were parties, we are of opinion that the copartnership was a fraud upon the United States, and that a court of equity ought not to lend its aid to either of the partners against the other.

It is proved that Mr. Marsteller himself was the agent of the government in making the contract; and it is expressly averred in the plaintiff's bill, "that, when this contract was made, it was understood and agreed between George Coleman, the defendant, and Ferdinand Marsteller, now deceased, that they should share with your orator the profits of the contract; that is to say, that each should receive one third of the profits."

If this be not fraud *per se*, it is such strong evidence of it that the Court, in the absence of all exculpatory proof, must consider the transaction as fraudulent. No such exculpatory proof is produced; but the plaintiff himself avers that great frauds were committed upon the government by Mr. Marsteller.

Under these circumstances, this Court, as a court of equity, will not lend its aid to enforce this iniquitous agreement, but will leave the parties to their legal remedies. The bill must be dismissed, but without costs.

MORSELL, J., concurred.

THRUSTON, J., absent.

Judgment affirmed. 4 Peters, 184.

RICHARD M. SCOTT v. EZRA LUNT'S ADMINISTRATOR.

The assignee of a ground-rent, in fee, may maintain an action of covenant against the administrator of the original grantee, for rent accruing after the death of that grantee, although the land has descended to his heirs, subject to the rent.

COVENANT by the assignee of the ground-rent of a lot in Alexandria, conveyed in fee, by the late General George Washington, to Ezra Lunt, who covenanted for himself, his heirs, and assigns, to pay an annual rent of \$73 forever.

The declaration and *oyer* set forth the original deed from General Washington to Ezra Lunt, in fee, reserving an annual ground-rent of \$73 forever; the covenant, on the part of Lunt, to pay the rent; the assignment of the rent, by General Washington, to the plaintiff; the death of Lunt; the granting of administration of his estate to the defendant; and the accruing of the rent since his death.

Mr. Taylor, for the defendant, after *oyer*, demurred to the declaration, and contended that the action could not be maintained.

The question was, at the last term, submitted to the Court by *Mr. Taylor*, for the defendant, and *Mr. Swann*, for the plaintiff.

The Court considered it in the vacation, and its opinion, (THRUSTON, J., absent,) was now delivered by CRANCH, C. J.

The late General George Washington conveyed a certain lot of land in Alexandria to Ezra Lunt, in fee, reserving an annual rent of \$73; and there was an express covenant by Lunt, for himself, his heirs, and assigns, to pay the rent. Lunt died, and this action of covenant is brought against his administrator for rent which accrued after his death, and, consequently, after the land had descended to his heirs at law.

Mr. Taylor, for the defendant, contended that as the estate became vested in the heirs by the act of the law, and not by the voluntary assignment of the lessee, the privity of contract was destroyed, as well as the privity of estate, between the assignee of the lessor and the personal representatives of the lessee. The lessee, after a voluntary assignment, may be liable upon his express covenant; because he has voluntarily parted with the estate, and may take counter security from his assignee. But the law, which takes away the estate, for the enjoyment of which the rent is given, would be unjust if it left the lessee liable for the rent; and the person who acquires the estate in the right of the lessee would stand in a much better situation than the lessee himself, as he would have the whole benefit of the estate without its burden. *Nemo debet locupletari alienâ jacturâ.*

No authority was cited by *Mr. Taylor* in support of this view of the case. It was, however, probably suggested by what fell from Mr. Justice Yates, in the case of *Mayor v. Steward*, 4 Burr. 2439, 2443, namely, "As the act divests him of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him if he should remain still liable to it when he is disabled by the act of parliament from performing it;" and by the arguments of the counsel in that case, and in the case of *Mills v. Auriol*, 1 H. Bl. 443, and of *Auriol v. Mills*, 4 T. R. 94. But those arguments were overruled by the judgment of the court.

It is said, however, that those cases were under the bankrupt act; and that the assignment, being in consequence of the act of the bankrupt himself, the property cannot strictly be said to have passed out of him, by the act of the law, without his own concurrence.

Some countenance is given to this idea by the language of Lord Loughborough, in *Mills v. Auriol*, 1 H. Bl. 444. But the opinion of the Court of King's Bench in the same case, in 4 T. R. 98, does not seem to have been at all influenced by that consideration. Lord Kenyon, in delivering the opinion of the court there, says: — "It is extremely clear that a person who enters into an express covenant in a lease, continues liable on his covenant, notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear. If the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears, by the authorities, that an action of debt will not lie against the original lessee; but all those cases, with one voice, declare that if there be an express covenant, the obligation upon such covenant still continues." "It cannot be disputed that, where a disposition of the lease has been made by virtue of a *fieri facias*, or an *elegit*, the lessee continues liable upon his covenant, notwithstanding the estate be taken from him against his consent. On the same principle, the South Sea director was held liable, although he was divested of his property by the act of confiscation. *Hornby v. Houlditch*, Andrews, 40; 1 T. R. 93, n. a. So in the case of an attainder, and other cases." "Then it was contended that the bankruptcy put an end to the contract; but that argument is not well founded. For it was asked by Lord Hardwicke, in the case of *Hornby v. Houlditch*, what is there here to discharge the privity of contract, or estate, between the lessor and lessee? or what is there to discharge an express covenant?" "I may ask the same questions in this case. Has the landlord done any act to

discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those, in my opinion, are much stronger cases than the present, where the assignees are forced upon the landlord without his consent."

In the case of *Kunkle v. Wynick*, 1 Dall. 305, the plaintiff had conveyed a lot of land to the defendant in fee, rendering an annual rent; the defendant had assigned his interest in the premises before any rent had become due; and the plaintiff had received one year's rent from the assignee. The plaintiff brought his action of covenant against his original grantee, and recovered judgment.

The difference between that case and this is, that there the assignment was voluntary, and the plaintiff had accepted rent from the assignee; but here was no assignment, and no acceptance of rent from the heirs at law by the plaintiff; and no other act of the plaintiff waiving his right of action upon the covenant. The original grantee of the land knew that upon his dying seized, and intestate, the land would descend to his heirs at law, and that his administrator would be bound by the covenant. There is no more hardship in this case than in that of a mortgage, where the administrator may be compelled, by the bond or covenant of the intestate, to pay the mortgage-money for the benefit of the heir at law; or in that of a contract to purchase land, and the purchaser has given his bond for the purchase-money, the land being conveyed upon the faith of the personal security. The land would descend to the heirs, and the personal obligation would devolve on the administrator, who, if obliged to pay the money, could not compel the heirs to refund it.

Upon the authority of these cases cited by the plaintiff's counsel, as well as upon the general principles of reason and law, we think the plaintiff is clearly entitled to maintain his action of covenant against the administrator. This opinion is substantially affirmed by the Supreme Court of the United States in *Scott v. Lunt*, 7 Peters, 602, per Story, J. See also *Pember v. Mathers*, 1 Bro. C. C. 52.

UNITED STATES v. SHACKELFORD.

The name of a prosecutor must be written at the foot of every indictment for a misdemeanor, in Alexandria county, before it is sent to the grand jury, unless it be founded upon a presentment made upon the knowledge of two of the grand jurors, or upon the testimony of a witness called upon by the Court or the grand jury.

INDICTMENT for assault and battery upon Jacob Millan.

The indictment had been sent to the grand jury by *Mr. Swann*, attorney of the United States, in consequence of a presentment of the grand jury at November term, 1827, which stated that evidence had been heard before them whereby it appeared that Richard Shackelford, one of the constables of the county of Alexandria, was guilty of an assault on the body of Jacob Millan, but that the time limited by law for the prosecution of misdemeanors had passed.

Mr. Taylor, for the defendant, moved to quash the indictment because the name of a prosecutor was not written at the foot of it, according to the law of Virginia, p. 105, § 24; and cited the case of *Helriggle* at the last term, [*ante*, 179.]

The COURT (MORSELL, J., absent,) quashed the indictment, and said they would hear a motion to order the witness to be sent to the grand jury.

See Virg. Rev. Co. p. 105, § 24, p. 106, § 38, and pp. 346 and 431; and *Hollinsberry's case*, [*post*.]

BANK OF THE UNITED STATES v. E. J. LEE.

The indorser of a promissory note is discharged from his liability by the holder taking new security, and giving time to the maker without the consent of the indorser.

THE defendant was the indorser of R. B. Lee's note discounted by the plaintiffs.

THE COURT, (*nem. con.*) on the motion of *Mr. Taylor*, the defendant's counsel, instructed the jury, in effect, that if they should find from the evidence that the plaintiffs, in consideration of new security given by the maker of the note, agreed with him, without the defendant's consent, to extend the time of payment of the debt for one year or more, the defendant was thereby discharged from his liability as indorser of the note.

Mr. Taylor cited the following authorities:—7 Bac. Ab. 507; *Nesbit v. Smith*, 2 Bro. C. C. 579; *Baird v. Rice*, 1 Call, 18; *Rees v. Barrington*, 2 Ves. Jr. 540; *Ward v. Johnson*, 6 Munf. 6; *Ellis v. Galindo*, Doug. 250, note; *Hill v. Bull*, Gilmer, 149; *English v. Darley*, 2 B. & P. 61; *The People v. Jansen*, 7 Johns. 332; Bul. N. P. 275; *Wilson v. Lenox and Maitland*, 1 Cranch, 194; *James v. Badger*, 1 Johns. Cas. 131; *Croughton v. Duval*, 3 Call, 69; *Chitty on Bills*, 300, (Amer. Ed. of 1817); *Duval v. Trask*, 13 Mass. Rep. 154; *United States v. Nicholl*, 12 Wheat. 510; *McLemore v. Powell*, 12 Wheat. 554, 557; *Moore v. Bowmaker*, 6 Taunt. 379.

Mr. Lear for the plaintiffs.

UNITED STATES, for the use of A. B., v. CRANSTON *et al.*

The sureties in a constable's bond are not liable for money collected by the constable without legal process.

DEBT upon a constable's bond. The breach assigned was that the creditor, A. B., for whose use this suit was brought, had put a note into the hands of Cranston, the constable, to collect; that he collected the money, and refused to pay it over to the creditor. It appeared that he collected it without legal process.

Mr. Mason, for the defendants, denied that they were liable upon their bond for the money thus collected.

Mr. Wise for the plaintiff, and *Mr. Mason* for the defendants, submitted the question to the Court without argument.

And the COURT (THRUSTON, J., absent,) said that the defendant (the constable) was not liable upon his official bond for this money, although he gave a receipt, as constable, for the note. His official duty only commences when he has legal process; and he is only liable officially, for money officially collected; that is, upon legal process.

UNITED STATES v. PITTMAN.

A prisoner arraigned for felony is to be placed in the criminal box, or dock, at the time of arraignment, but need not hold up his hand when called, if he admits himself to be the person indicted.

INDICTMENT for shooting John Corse, with intent to disfigure, maim, and kill him.

The prisoner requested that he might be permitted to plead without going into the criminal dock, in which prisoners usually stand when arraigned, and which is set apart for that purpose.

The attorney for the United States did not assent to it.

Mr. Neale, for the prisoner, cited *Burr's case*, in which the arraignment was dispensed with.

The COURT (*nem. con.*) said, that according to the practice in this court, and of other courts of criminal jurisdiction, for the purpose of preserving order and regularity, a certain place in court is assigned in which persons are to be placed by the marshal, to be arraigned. The record states that he is brought to the bar in the custody of the marshal, and the Court think proper to adhere to the practice.

The prisoner then went into the prisoner's box. The Court told him that if he acknowledged himself to be the person indicted, he need not hold up his hand. He was then arraigned, and pleaded not guilty.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1828, AT WASHINGTON.

LAVERTY AND GANTLEY v. JOSIAH SNELLING.

If the affidavit to hold to bail be in itself sufficient, the Court will not, upon a motion to appear without bail, inquire into the merits of the case.

An affidavit that the defendant is justly indebted to the plaintiff in a certain sum, for goods sold and delivered to a third person upon the written guaranty of the defendant, is sufficient to hold the defendant to bail.

THE affidavit to hold to bail stated that the defendant was justly indebted to the plaintiffs in the sum of \$4,393.43, for goods sold and delivered to one C. P. Hunt, at the defendant's request, and upon his written guaranty, which was produced.

Mr. Lear moved for leave to enter his appearance for the defendant without special bail; contending that the guaranty was void because it does not show a consideration for the guaranty; and that it did not appear that the plaintiffs had given notice to the defendant that they had accepted the guaranty, or had notified him of the amount of goods sold to Hunt upon the credit of the defendant; that the defendant had a right to go into the merits of the case and show that the contract was void. *Sumner v. Green*, 1 H. Bl. 301; *Clarke v. Russell*, 3 Dall. 415; *Forrester*, 153.

Mr. Wallach, contra. The Court overruled the motion.

TILLEY v. WILLIAM THARP.

UPON a motion to appear without bail because the affidavit to the plaintiff's account, by mistake of the attorney who wrote it, named the defendant James instead of William; the Court took time to consider till the next day, when the mistake was corrected.

THE declaration and the account filed were against William Tharp, but the affidavit at the foot of the account was against James Tharp.

Fowle and Daingerfield v. Bowie.

Mr. Beale, for the defendant, offered to appear without bail.

Mr. R. P. Dunlop, for the plaintiff, said it was his mistake in writing the affidavit, and he would have it amended to-morrow.

The COURT (*nem. con.*) said they would consider until to-morrow, to give the plaintiff's counsel an opportunity to correct the mistake, when it was corrected and the defendant ruled to give special bail.

HUTCHINSON v. DECATUR.

If the jury take out the plaintiff's account, without the consent of the defendant, the Court will grant a new trial.

THE jury having taken out an account of the plaintiff without the defendant's consent, came in and declared their verdict.

Mr. Redin, for the plaintiff, before the verdict was entered and affirmed, discovered the error, and requested that the paper should be withdrawn, and the jury sent out again with an instruction that the paper was not evidence; which the COURT (*nem. con.*) granted.

The jury then retired and returned a verdict for a smaller sum.

Mr. R. S. Coxe, for the defendant, moved for a new trial; and cited *Erving v. Cook*, 15 Johns. 239, and *Penfield v. Carpenter*, 13 Johns. 350.

New trial granted.

FOWLE AND DAINGERFIELD v. ROBERT W. BOWIE.

Although the term should continue beyond the rule-day, the plaintiff is entitled to judgment by default, if the defendant did not plead by that day.

THE rule to plead expired in November, 1827. The May term was continued by adjournment beyond the rule-day. The defendant pleaded in abatement on the 6th of December, 1827, during the adjourned May term.

The plaintiffs' counsel, contended that it was too late, and that judgment should be entered by default.

Mr. Key, for the defendant, contended that if he pleaded before the expiration of the term in which the rule was laid, he was in time.

But the COURT (*nem. con.*) was of opinion that the rule-day being before the expiration of the term, made no difference; and that the plaintiffs were entitled to judgment by default.

SARAH WHELAN v. THE CORPORATION OF WASHINGTON.

The tax upon the slaves of non-resident owners, under the by-law of April 5, 1823, does not accrue until the hiring is complete.

If the tax be paid and received before the prosecution commenced, the owner is not liable to the penalty.

APPEAL from the judgment of a justice of the peace against a non-resident slaveholder for a penalty of \$20 for not paying the tax of two dollars on a female slave, hired out by the defendant, in the city of Washington, before the hiring, under the second section of the by-law of April 5, 1823. The tax was paid before the prosecution was commenced.

The COURT (*nem. con.*) was of opinion that as the tax was imposed upon slaves hired, it did not accrue until the hiring was complete; and that if paid and received before the prosecution, the defendant was not liable to the penalty.

Judgment reversed with costs.

WISE'S ADMINISTRATOR v. GETTY.

In an action by an administrator, upon the trial of the issue of *non assumpsit*, the plaintiff need not produce his letters of administration.

ASSUMPSIT on a promissory note to the intestate. Plea, *non assumpsit* and issue.

On the trial the defendant's counsel (*Mr. Marbury*) called for the plaintiff's letters of administration.

Mr. R. S. Cox, for the plaintiff, cited *Starkie*, part 4, p. 547, 548.

The COURT said, that the representative character of the plaintiff is not in issue, and the plaintiff need not prove it.

BANK OF COLUMBIA v. JAMES MOORE.

The issuing of the execution by the Bank of Columbia under the Act of Maryland of 1793, c. 30, is the commencement of the action in regard to the statute of limitations.

THIS was a *feri facias* issued by order of the president of the Bank of Columbia under its charter of 1793, c. 30, without a judgment. The defendant pleaded *non assumpsit* within three years next before the commencement of this suit.

Mr. Key, for the plaintiff, contended that the demand of pay-

ment, which was a necessary preliminary to the issuing of the execution, was the commencement of the suit. The demand was made five days before the expiration of the three years, but the bank could not issue the execution until ten days after the demand, which was five days after the expiration of the three years.

The COURT (*nem. con.*) said that the issuing of the execution was the commencement of the suit.

Verdict for the defendant.

Motion for new trial, for misdirection of the jury by the Court upon this point, overruled, but a new trial was granted upon affidavit of newly-discovered evidence.

BANK OF COLUMBIA v. GEORGE SWEENEY.

An offer to compromise a debt by payment of one half without interest, is not sufficient to take the case out of the statute of limitations.

THIS was an execution against the defendant issued by order of the president of the Bank of Columbia, under its charter of 1793, c. 30, without a judgment, the execution being the first process in the suit. The defendant pleaded the act of limitations. To rebut this plea the plaintiffs offered evidence that, seven years after the note on which the suit was brought, was barred by the statute, the defendant offered to give his note for one half of the amount of the original note, if the bank would relinquish all claim to the balance and interest, and permit him to pay as he should find it convenient. The bank said they would accept the proposition, but their acceptance was never made known to the defendant, and nothing further passed between the parties, until this suit was commenced by execution under the power given by the charter of the bank.

The COURT (THRUSTON, J., absent) was of opinion, and so instructed the jury, that this evidence was not sufficient to take the case out of the statute of limitations.

UNITED STATES v. THOMAS D. THOMAS.

Perjury may be committed in an affidavit to an account, for the purpose of getting it passed by the Orphans' Court.

INDICTMENT for perjury in making affidavit to an account of

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Barton against Bryan's estate, for \$157 for five years' board of a child, for the purpose of getting it passed by the Orphans' Court.

The question submitted by *Mr. Key*, for the defendant, and *Mr. Swann* for the United States, was, whether the affidavit made by the defendant, on the 27th of December, 1827, before Robert Clarke, a justice of the peace, was perjury, if false.

Mr. Key contended that it was not in a judicial proceeding.

The defendant had sworn, in that affidavit, that he knew the account to be just and true; and that the creditor (Barton) had boarded a child for Bryan for five years; and that Bryan had agreed to pay him \$30 a year for the board of the child.

But the COURT, upon consideration of the Testamentary Act of Maryland (1798, c. 101, cl. 9, § 8,) and the Act of 1785, c. 46, was of opinion, (*nem. con.*) that the affidavit was taken in a judicial proceeding, and if knowingly false, it might be perjury.

NEGRO LOUISA JOHNSON v. MILO MASON.

If a slave be not brought into the county of Washington for sale, nor to reside permanently, he is not entitled to freedom under the Maryland Act of 1796, c. 67.

PETITION FOR FREEDOM. The COURT (*nem. con.*) was of opinion that if the petitioner was not brought into this county for sale or to reside, she is not entitled to freedom under the Maryland Act of 1796, c. 67, and that the act meant a permanent residence, a residence without expectation of change.

See the case of *Jordan v. Sawyer*, in this Court at April term, 1823, [2 Cranch, 373.]

NATHANIEL FRYE, JUNIOR, v. JESSE SCOTT.

When the condition of an arbitration-bond is to abide by the award of J. P. and S. B. ("and a third person to be chosen by them in case they should not agree upon an award,") the award need not state why it is signed by the three arbitrators, nor that the third person was appointed in writing; nor that the two named had disagreed before they appointed the third.

DEBT for \$200, the penalty of an arbitration-bond to abide by the award "of Jacob Paine and Samuel Boucher, and a third person to be chosen or agreed upon by them, in case they should not agree upon an award, or any two of them."

Mr. Worthington and *Mr. R. P. Dunlop*, objected that the award, which was signed and sealed by the three arbitrators, did not state why it was made by three when only two were named

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in the bond; and that there was no written evidence of the appointment of Frederick Perley, the third person who signed the award; and cited Caldwell on Arb. 42, and *Still v. Halford*, 4 Camp. N. P. Ca. 16.

Mr. Hellen, contra. Perley was not an umpire, but an arbitrator with the others, and equally within the submission.

The COURT (*nem. con.*) overruled the objections, saying that it was not necessary that the appointment of Perley, by the two other arbitrators should be in writing; nor that the award should state that the two had disagreed before they appointed Perley. These facts may be proved by parol.

Verdict and judgment for the plaintiff.

 JOHN LAW'S ADMINISTRATOR v. ALEXANDER SCOTT.

An insolvent debtor who has been discharged under the insolvent act, is not liable for the costs of a suit pending at the time of his discharge.

THE defendant was brought in upon a *ca. sa.* for costs in a suit which was pending at the time of his discharge under the insolvent act.

THE COURT (THRUSTON, J., doubting) ordered the defendant to be discharged under the tenth section of the act for the relief of insolvent debtors within the District of Columbia.

 BANK OF THE UNITED STATES v. GEORGE C. WASHINGTON.

Payment of a check by a bank is *primâ facie* evidence of funds, and that the apparent state of the funds upon the books of the bank justified the payment; and it is incumbent upon the bank to prove the error if there was any.

A bookkeeper of a bank is not obliged to answer a question, the answer to which, might charge himself with the loss.

ASSUMPSIT for money had and received by an overdraft paid by the bank by mistake, owing to wrong addition.

The plaintiffs proved all the debit side of their account which consisted of checks drawn by the defendant and paid by the plaintiffs. They proved also that it was their usual practice to pay according to the apparent funds in their ledger without examining further into the actual state of the funds.

THE COURT was of opinion that the payment of the checks by the bank is *primâ facie* evidence of funds; and CRANCH, C. J., and THRUSTON, J., were of opinion that the payment of the

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checks by the bank was also *prima facie* evidence that the apparent state of the funds upon the books justified the payment, and that it was incumbent on the plaintiffs to prove error in the account, upon the apparent balance of which the check was paid.

The plaintiffs then offered Mr. C. W. Forrest, (who was book-keeper of the bank at the time,) and asked him whether, at the time a certain check for \$1,900 was drawn, the account upon the ledger showed a balance to that amount or more in favor of the defendant.

The witness objected to answer this question, because the bank had sued him upon his bond, intending to charge him with the balance of this account, so that he cannot answer, in one way, without charging himself.

The COURT (*nem. con.*) refused to compel the witness to answer the question.

Verdict for the defendant.

NEGRO JOHN BATTLES v. THOMAS MILLER.

If a citizen of Virginia, the owner of a slave there, who had resided in Virginia three whole years, remove into the county of Washington with the *bonâ fide* intention to settle therein; and bring the slave with him, at the time of his removal or within one year thereafter, to reside in the said county, such importation is not contrary to law; but a sale of such slave, in the said county, within three years after such importation, may entitle him to his freedom; although such sale be made to a person residing out of the District of Columbia, and in a State wherein slaves are lawfully held, and intending to take the said slave out of the District of Columbia to the place of the purchaser's residence, and with that intent removing him from Washington to Alexandria, where he ran away and came to Washington and the sale was by mutual consent rescinded; and although the sale, (commenced in Washington,) was not consummated till the removal of the slave to Alexandria; and although the agreement for the sale was made in Alexandria, out of the county of Washington, and was not to be complete till the slave should be delivered by the seller to the purchaser at Alexandria, where the delivery, in fact took place; and although the agreement for the sale was made at Alexandria, out of the county of Washington, and was completed at Alexandria by the delivery of the slave, from the vendor to the vendee, there.

PETITION FOR FREEDOM. Upon the trial, the defendant's counsel, *Mr. Ashton* and *Mr. Jones*, after stating the evidence, prayed the Court to instruct the jury,

1. That if they should be of opinion, from the evidence, that James Richard Miller was a citizen of the United States, and came into the county of Washington, in the District of Columbia, with the *bonâ fide* intention of settling therein, and imported or brought into the said county, at the time of his removal into the said county, or within one year thereafter, the petitioner, to

reside in the said county, and that the said petitioner was the property of the said James Richard Miller at the time of his said removal; and that the petitioner was at the time of his said owner's removal a slave who had resided in the State of Virginia, one of the United States, for three whole years next before such removal, then, and in such case, the petitioner was not imported, or brought into the said county, contrary to law.

Which instruction the Court gave as prayed.

2. The defendant's counsel then further prayed the Court to instruct the jury, that if they should be of opinion from the evidence, that the petitioner was imported or brought into the said county, under the circumstances and in the manner aforesaid, then the subsequent sale of him by his said master, although within the county of Washington, and within three years next ensuing the time of such removal, would not entitle the petitioner to his freedom.

Which instruction the Court refused to give.

3. The defendant's counsel then prayed the Court to instruct the jury, that if they should find, from the evidence, that the said sale was made to a person residing out of the District of Columbia, and in a State where slaves were lawfully held; and that the immediate and known intent and purpose of the purchaser, in making the said sale, were to take the said slave out of the said district to the place of the purchaser's residence; and that he did immediately, and in fulfilment of such original intent and purpose, remove the said slave from Washington to Alexandria, on his way to his ultimate destination; that the said slave, after being so purchased and removed to Alexandria, was never brought back, by his owner, to Washington; but while temporarily detained in Alexandria till the said purchaser was ready to proceed on his journey, absconded and returned to Washington of his own accord, and that the sale was then rescinded by agreement of parties, then the petitioner did not become entitled to his freedom in virtue of such sale.

Which instruction was also refused by the Court.

4. The defendant's counsel, then, further prayed the Court to instruct the jury, that if the said sale was not, in the opinion of the jury, from the evidence, consummated till the removal of the petitioner to Alexandria as aforesaid, though the treaty for the sale commenced before, then the petitioner became not entitled to freedom in virtue of such sale.

Which instruction was also refused by the Court.

5. Whereupon the defendant's counsel further prayed the Court to instruct the jury, that if they should find, from the evidence, that the agreement for the said sale was made at Alex-

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andria, out of the county of Washington, that in the terms of the said agreement the sale was not to be complete till the petitioner should be delivered by the seller to the purchaser at Alexandria, and that such delivery in fact took place there, then such sale and delivery do not entitle the petitioner to freedom.

Which instruction the Court also refused to give.

6. Whereupon the defendant's counsel further prayed the Court to instruct the jury, that if they find from the evidence, that the agreement for the said sale was made at Alexandria, out of the county of Washington, and was completed at Alexandria by the delivery of the slave from the vendor to the vendee, there, the said sale is not competent to entitle him to his freedom.

Which instruction the Court also refused to give.

In all these opinions, except the last, the judges concurred. In the last Judge Thruston did not concur.

Upon the point that the sale within three years entitled the prisoner to freedom, the Court referred to the case of *Dunbar v. Ball*, at October term, 1821, [2 Cranch, 261,] as conclusive. They also referred to *Jordan v. Sawyer*, in this court at April term, 1823, [2 Cranch, 373.]

CRANCH, C. J., was of opinion that if the slave was sold by the importer within the three years, the importer is not protected by the 2d section of the Act of 1796, c. 67, from the prohibition contained in the first section.

The 1st section contains the general principle — the prohibition to import slaves. The 2d section contains the exception in favor of those who come to reside. The 3d section is an exception to the second. If the case be within the 3d section, it is not within the 2d, and if not within the 2d it is within the first. He was also of opinion that it was immaterial whether the sale was made in or out of the county of Washington. Verdict for the petitioner.

JOHN G. McDONALD v. GEORGE B. MAGRUDER.

The indorsers of accommodation paper are to be considered as joint sureties, and liable to contribution.

ASSUMPSIT by the last indorser against his immediate indorser of S. Turner's note, dated 15th October, 1823, for \$150 at 60 days, payable to the defendant at the Bank of the Metropolis, where it was discounted for the accommodation of Turner. The plaintiff, being the last indorser, put his initials to these words, at one corner of the note, "credit the drawer." The note not having been paid by the maker, was taken up by the plain-

 Magruder v. McDonald.

tiff, who brought this suit against the first indorser. The plaintiff and the maker of the note were both clerks in the office of the Secretary of the Senate. The cause was tried at December term, 1825.

The counsel for the defendant contended that, as no consideration passed between these indorsers, the plaintiff could only recover upon the principle that joint sureties were liable to contribution. That the words "credit the drawer" were evidence that the indorsers were to be considered as joint sureties.

Mr. Wallach, for the plaintiff, prayed the Court to instruct the jury that these words were not evidence that the plaintiff and defendant had jointly agreed to become indorsers for the accommodation of Turner; which instruction the COURT (MORSELL, J., absent,) refused to give, and the jury found a verdict for the plaintiff for only half the amount of the note.

Mr. Wallach moved for a new trial, on the ground that the Court erred in the refusal of the instruction.

But the COURT (MORSELL, J., absent,) refused the new trial. They thought the memorandum was evidence that the plaintiff never paid the defendant any thing for the note, and therefore the plaintiff could recover nothing from the defendant unless upon the ground that the defendant had agreed to become joint surety with the plaintiff; and that the jury did right in finding a verdict for only half of the amount of the note.

But see the next case.

GEORGE B. MAGRUDER v. JOHN G. McDONALD.

If two persons, without any communication or agreement between them, severally indorse a note for the accommodation of the maker, and the first indorser is obliged to take up the note, he may recover one half from his indorsee.

INDEBITATUS ASSUMPSIT, for money paid, laid out, and expended by the plaintiff, for the use of the defendant, at his request, and upon an *insimul computasset*.

At the trial a verdict was rendered for the plaintiff by consent, subject to the opinion of the Court upon the following case agreed.

In this case it is agreed that the plaintiff produced in evidence a promissory note, in these words and figures, to wit:

"\$950 George Town, November 25th, 1823.

Sixty days after date, I promise to pay George B. Magruder, or order, nine hundred and fifty dollars, at the Office of Discount and Deposit, Washington, for value received.

SAM'L. TURNER, JR."

which note was written and signed by the said Samuel Turner, and indorsed by the plaintiff, the said George B. Magruder, and by the defendant, the said John G. McDonald.

That the said note was so drawn and indorsed, with the understanding of all the said parties thereto, that it should be discounted in the said Office of Discount and Deposit, for the sole use and accommodation of the maker, the said Samuel Turner, no value being received by either of the said indorsers. That it was so discounted, and the proceeds thereof applied to the credit of the said Turner in the said office. That long before the making of the said note, viz., in the year 1819, the said Turner had two notes discounted for his use and accommodation in the said office, namely, one for \$270 indorsed by the said George B. Magruder and by the said John G. McDonald; and one for \$710 indorsed by the said George B. Magruder and one Samuel Hambleton; which last-mentioned note was continued by renewal with the indorsement of the said Magruder and Hambleton until September, 1820, when, in consequence of the said Hambleton's absence, it was protested; after which the said office permitted the accommodation to be renewed, upon condition that the said Turner should get another good indorser in the place of the said Hambleton; whereupon the said John G. McDonald, at the solicitation of the said Turner, indorsed a note for the said sum of \$710, which was brought to him already indorsed by the said George B. Magruder. That in March, 1821, a small part of the money having been paid, the two notes were consolidated and renewed by one note for \$950, drawn by the said Turner, and indorsed by the said Magruder, and by the said McDonald, which was, from time to time, renewed by notes similarly drawn and indorsed, the last of which is the aforesaid note so produced in evidence by the plaintiff. That neither at the time of indorsing the said notes respectively, nor at any other time, was there any communication between the said Magruder and the said McDonald upon the subject of such indorsement. Both of them, however, knew, at the time of indorsement, that the said notes were intended to be discounted for the accommodation of the said Turner; and in every instance the said Magruder was the first indorser. That the said note so as aforesaid produced in evidence by the plaintiff, not having been paid when due, was duly protested, and the payment thereof having been duly demanded, and due notice of such demand and of non-payment having been given to the said indorsers, judgments at law were obtained against both, by the Bank of the United States; and the whole amount having been paid by the said Magruder, he brought this suit to recover, from the said McDonald, one half of the amount so paid by the said Magruder.

By consent of the parties in this suit, a verdict is rendered for the plaintiff for one half of the amount so paid by the said Magruder, as aforesaid, in satisfaction of the judgment against him, subject to the opinion of the Court upon this case agreed; and if, upon this case agreed, the Court should be of opinion that the plaintiff is entitled to recover, then judgment shall be entered according to the said verdict; but if the Court should be of opinion that, upon the said case agreed, the plaintiff is not entitled to recover, then the said verdict shall be set aside, and judgment of nonsuit shall be entered for the defendant.

Mr. Wallach, for the defendant, cited *Robertson v. Williams et al.*, 5 Munford, 381; *Hickson v. Reed*, 2 Littell's Kentucky Rep. 174; *Brown v. Mott*, 7 Johns. 361; *Morgan v. Reintzel*, 7 Cranch, 273.

Mr. Key and *Mr. Dunlop*, for the plaintiff, cited *Wood v. Repold*, 3 Har. & Johns. 125.

MORSELL, J., delivered the opinion of the Court as follows, (CRANCH, C. J., dissenting.)

This action was brought to recover of McDonald one half of a sum of money, which the plaintiff has been compelled to pay to the Bank of the United States, as indorser for Samuel Turner.

This was the case. In the year 1819 the bank discounted two promissory notes, for the sole accommodation of Turner: one indorsed by George B. Magruder and John G. McDonald, for \$270; the other indorsed by George B. Magruder and Samuel Hambleton, for \$710.

On the 20th of September, 1820, the last-mentioned note was renewed, and McDonald received as indorser, in lieu of Samuel Hambleton. In March, 1821, the two notes were consolidated; some small sum of curtail having been paid. Magruder was the first indorser in each instance. This note of \$950 is a renewal and continuance of other notes, similarly drawn and discounted for the said Turner's sole accommodation. At length, Turner failing to pay, it was duly protested; and the bank recovered several judgments against Magruder and McDonald, as indorsers.

Turner obtained the indorsement of Magruder, with the understanding that another accommodation indorser was to come on the note. The note, with Magruder's indorsement, was taken to McDonald, by Turner, who presented it to him for his indorsement merely, and McDonald, as soon as he had indorsed it, returned it to Turner, who offered it to the bank, and for whom it was discounted. McDonald, at the time he received and indorsed it, knew that it was for the sole accommodation of Turner, and for that purpose was indorsed by Magruder. Mc-

Donald indorsed it at the instance and request of Turner, and for his like sole accommodation, and without having paid any consideration for the note.

The substance of the argument against the recovery, as I have understood it, is, that this cannot be considered as a case of co-securities, (sureties); that the indorsements are separate, made at different times, and not joint, and without any understanding between them that they were so; and, from the nature of the instrument, the indorsement is evidence of a sufficient consideration, and amounts to an agreement, on the part of the first indorser with the second, that, in the event of non-payment by the drawer, the first indorser was to pay the full amount.

Several adjudged cases were cited and relied on, to support the defendant's objections. The one which seems to me most like the case before the Court, was that of *Wood v. Repold*, in the Court of Appeals in Maryland; though in that case there was the absence of a fact which exists in this, and which might have been thought material. In that case Wood did not look to the case of any subsequent accommodation indorser coming on the note. In this case it was otherwise with Magruder.

But, supposing the cases alike, let us examine its principles, to show in what cases persons are to be considered as securities, (sureties,) where they will be equally bound to each other to pay one half of the debt of their principal, and the principle of law by which they are so bound.

The very familiar case of a joint bond is put. It is, however, conceded, that the bond need not be executed by the sureties at the same time; and there is no necessity that there should be any previous express agreement or understanding between them; and that it is not even necessary that the first-signing surety should know who, or that any one is to come after him, as surety in the bond; yet, by operation of law, they are co-securities, and either, who pays the whole, may call upon the other for his contribution.

Now what is here meant by the operation of law, creating or imposing upon them a joint liability? or, by operation of law they would be bound to contribute? Is it meant that there is any express or implied contract contained in the bond, between the securities?

We are all too familiar with the terms of a joint bond to entertain a moment's doubt that there is not, from beginning to ending of it, one single stipulation between the securities, either express, or from which the law can imply any such obligation. Therefore, if any such obligation is created between them by operation of law, it is upon other principles; which principles we shall endeavor

vor to show are not peculiar to the form of a joint bond. It is said, with a view to show a difference in principle between indorsers and co-securities in a bond, "that consideration is always presumed in the case of indorsers, *inter se*, and never in that of securities in a bond."

We shall endeavor to show that, without an actual real consideration, there is no difference in the cases.

Other reasons are assigned, for the purpose of showing that the indorsers, in that case, were not to be considered as co-sureties, and not bound by the operation of the same principle of law as in the case of a bond. It is objected that their indorsement is several, and not joint; at different times, and without any understanding between them to that effect. But I understand it to be conceded that, in the case of a bond, they would be equally bound if it were a joint and several bond, and although it were signed at different times, and without any knowledge, by the first signer, who or whether any other was to sign it as such.

The other part of the opinion is taken up in showing that want of consideration could not be available as a defence in that action. It proceeds:—"The bill in question, though drawn and indorsed for the accommodation of the drawer, to enable him to raise money upon it, must be considered as if it had been made in the ordinary course of business, subject to all the law and incidents attending bills of exchange, indorsed and passed in the regular course of negotiation. The same principles of law, and the same rules of evidence, equally apply to both; and, when so considered, the objection that Wood received no money consideration at the time of his indorsement, appears to me to have no weight." "The want of consideration" "extends to all bills of exchange, whether for accommodation or otherwise. But that principle, when tested by the established practice and settled forms of proceedings in actions on bills of exchange, will, I think, be found applicable only to the particular stage of the negotiation in which the bill has stopped in the hands of the party suing, who, having never passed it away, has, consequently, been obliged to pay nothing upon it, nor has created any liability on himself to pay; and, therefore, can only recover in virtue of a consideration passed by him to the party from whom he received it; and, in such case, it is that consideration alone which gives him a right of action. And although the law supposes a consideration, and the plaintiff is under no necessity to prove one, yet, if none did pass, it was a naked undertaking, of which the defendant may discharge himself at the trial, by showing a want of consideration, or that

it was an illegal one. But the same principle does not apply to this, or any case of an indorser or intermediate indorsee, who, under his liability on his indorsement, has been obliged to pay or take up the bill. If it did," (exist in such a case, or could apply in such a case,) "there never could be a recovery on a bill of exchange, by an indorser, or intermediate indorsee, against the drawer or immediate indorser; for every indorser, by his indorsement, discharges the preceding parties, as to himself, and constitutes his indorsee the payee. No consideration, therefore, which he may have originally paid for the bill can afford him a ground of action; for, having parted with all his interest in it, he is presumed in law to have received a valuable consideration for it, and can have no right to the money a second time. He cannot, then, recover, in consideration of what he may have originally given for the bill; nor could he have an action on the bill, in consideration of payment by him in virtue of his indorsement; as such payment is not a consideration originally given for the bill, but must be subsequent, which is contrary to every day's experience; for no action is more common than that by an indorser against the drawer, or an intermediate indorsee against his indorser, in which the plaintiff can only recover on proof of payment by him to the *bonâ fide* holder of the bill; which payment gives him a new title to receive the money from the antecedent party, and is the very foundation of the suit; and the consideration-money between them, as immediate parties to the bill, is never made a subject of inquiry, and, if proved, could not aid the plaintiff."

The judge then draws his conclusion:—"And this shows that the principle, that, as between immediate parties to a bill of exchange, the want of consideration is a sufficient defence, is only applicable where a payee or indorsee has never parted with the bill;" "and that it does not apply to any party to a bill, who, on its being protested, has been obliged to take it up; in which case it is not the consideration originally moving from him which entitles him to recover, but it is the subsequent payment alone on which the law raises the promise, and gives him a new cause of action; and he sues in the capacity in which he paid, and not in that in which he received it."

In answer to the principles and reasoning in that part of the case just stated, I hold the law to be, that where a person merely indorses a bill for the purpose of assisting another in raising money, he is only a surety for that other, and he has no demand till the payment of the money. (See Evans on Bills, p. 149.) And if there were many, instead of one, they would be all equally sureties.

On the subject of the right to go into the consideration of the equitable circumstances attending the transaction, I understand the law to be, that it is not owing to the form of a bill of exchange, or note, nor the circumstance of its being in writing, that the law gives it the effect of carrying with it the same presumption of a consideration as a bond, or other specialty, when in the hands of a third person; but it is in order to facilitate and strengthen that commercial intercourse, which is carried on through the medium of this species of security. Therefore, in an action brought against the party, by the person with whom he was immediately concerned in the negotiation of the instrument, or by the person who has given no value for it, in such regular commercial intercourse, he will be at liberty to prove, either that the consideration was an unlawful one, or none at all, or what it was, with all the circumstances.

Where a bill is not taken in the usual course of trade, it is subject to all the equities that subsisted between the original parties. *Evans v. Smith*, 4 Binney's Rep. 366.

A bill or note, therefore, does not become clothed or protected by the presumptions or incidents of real commercial negotiable paper, (the consideration whereof shall not be impeached,) until it gets into the hands of a *bonâ fide* holder before the bill or note falls due, and without notice. It is true that there are cases in which the equitable circumstances may be gone into, and where the want of consideration would not be an available defence, and this is sometimes the case of indorsements for the accommodation of the drawer; but it is in those cases only where the indorsee, or holder, has paid a valuable consideration for it at the time he receives it. If it has been paid to the drawer, for whose accommodation the note was drawn and indorsed, it is considered, in law, as being also for the benefit of the indorser, or indorsers; and so the following cases will show it has been adjudged.

"If the indorsee knew that the bill was an accommodation bill, he can recover no more against the indorser than the value he has paid; but if the bill was made on a good consideration, he may recover the whole; and if he has not paid full value for it, he is a trustee for the indorser in respect of the surplus." Starkie, part 4, 282, (o.)

"Whenever the holder has given full value for the bill before it is due, the defendant will not be at liberty to show that he had received none, although the plaintiff knew that circumstance at the time he became the holder, unless he also knew that the party from whom he received it was acting fraudulently." Chitty, 84, 86.

A plaintiff cannot, in general, maintain his action against the person from whom he received the bill, unless he gave him a valuable consideration for it. 7 T. R. 350, 378, 571.

But it is said, "these principles will be found applicable only to the particular stage of the negotiation at which the bill has stopped in the hands of the party suing, who, having never passed it away, has consequently, been obliged to pay nothing upon it," &c.

It really has been my most sincere desire rightly to understand, and duly appreciate this part of the opinion; but I doubt yet whether I have succeeded. That we may not be carried away by the mere sound of words, let the reasons assigned be taken. "Because, having never passed it away, he has, consequently, been obliged to pay nothing upon it, nor has created any liability upon himself to pay." Is this position correct? The case put is of immediate parties; such as the drawer and acceptor, the indorser and indorsee. Let us take the very case put, of an intermediate indorsee (or indorser.) Such an indorser has paid to his immediate indorser, one half of the amount of the bill only, or has paid no value at all for it, or the consideration between them has been an unlawful one, or such, his next antecedent, indorser has passed (it) to him for his own accommodation, and he indorses to another for a full consideration received of such other, and that other indorses it for like consideration.

When the bill falls due, it being unpaid by any of the other parties, this intermediate indorsee is obliged to take it up, or pay the amount to the last indorsee; can he recover any thing more from his next immediate indorser than he paid him for it, — suppose one half? Or, suppose he has received it from such immediate indorser without paying him any thing for it, but for his own accommodation; the books abound with authorities which support the position that he could not. The very case just cited by me, Starkie, part 4, 282, proves this; see also Chitty on Bills, 91.

The next reason, "For every indorser by his indorsement, discharges the preceding parties as to himself, and constitutes his indorsee the payee. No consideration," &c. Suppose it to be the case. How could that be a reason to prevent the party sued from showing want of consideration, &c. But is it the case? By his indorsement or assignment, it is true, whilst the bill remains in the hands of the assignee or indorsee, his rights and remedies upon the bill are suspended, but the moment he is obliged to pay the holder and receives back the bill, do not all the rights revive, and he become just as much entitled to recover upon the bill against the antecedent parties, as he ever was;

and upon what consideration? Upon the new consideration, as it is stated, which is given him by thus having been obliged to pay it and take it up? Not at all so; it is upon the old consideration and none other; and to this effect is the case of *Dugan v. The United States*, 3 Wheat, 182, 183. The words of the judge are, "After an examination of the cases on this subject, which cannot be all of them reconciled, the court is of opinion that if any person who indorses a bill of exchange to another for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded (unless the contrary appear in evidence) as the *bonâ fide* holder and proprietor; and shall be entitled to recover notwithstanding there may have been one or more indorsements in full, subsequent to the one to him, without producing any receipt, or indorsement back from either of such indorsers, whose names he may strike from the bill, or not, as he may think proper."

This case then, surely answers all the reasons with respect to the want of consideration, &c. being applicable only to the cases where the bill or note was stopped in the hands of the last indorsee.

The Kentucky case of *Hixon v. Reed* rests upon the authority of the New York case of *Brown v. Motte*.

That case differs essentially from the one before the Court. The second indorser did not indorse it solely for the accommodation of the drawer. He was as real a party as the last indorsee. He was to have, for his own use, one half of the amount of the bill, \$250.

In that case the court say, "If there had been any fraud in this case, or the plaintiff had not made any advance upon the note, the taking it under the knowledge stated in the case," (that is, of the first indorser's indorsing it for the accommodation of the drawer,) would have let in a defence."

From the best consideration I have been able to give to the case before the Court, I think it is not so much a matter of consequence what the particular form of the instrument is, as what is the nature of the undertaking and engagement of the parties relatively considered to Turner the drawer. Is it a fair, proper case of contribution between the parties? To make it a case of that kind, and to be decided upon such principles, it is wholly immaterial what is the form of the instrument, which signs first, whether joint or several, with an understanding between the parties or not, whether signed at one time, or at different times, or whether it be by one instrument or several.

The principle by which they are obliged is not founded in the written contract, either express or implied *inter se*, at all. The only material matter required is, has the undertaking, entered

into by them, been in the same character? Are both of them bound as sureties for the same person, in the same sum? Are they in *æquali jure*, common in interest, common in burden? To this effect see Pothier on Oblig. p. 68, 69, and 2 Bos. & Pul. 268, 270, 271, 272, in which last case it is thus stated by the court. "The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract."

Again, in another part of the same case, the court say, "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments. In every one of those cases, sureties have a common interest, and a common burden. They are bound as effectually *quoad* contribution as if bound in one instrument," &c.

Upon the whole, therefore, I think the verdict for the plaintiff is right, and ought to stand.

THRUSTON, J. concurred.

CRANCH, C. J., dissented, and delivered the following opinion. The counsel for the defendant cited the following cases:—1. *Robertson et al. v. Williams and Smith*, 5 Hen. & Munf. 381, which was a joint action of debt, in Virginia, against the maker, Williams, and the first indorser, Smith, of Williams's promissory note which had also been indorsed by Lockhead and the plaintiffs, and discounted by a broker, and the proceeds received by Lockhead. The plaintiffs took it up, after protest, and recovered judgment against Williams and Smith who never received any consideration for the note, the same having been fraudulently negotiated by Lockhead, but the plaintiffs were ignorant of the fraud. The Court of Appeals gave no reason for their judgment. But Leigh and Wickham, in arguing, said,

1st. "The risk which the plaintiffs ran by indorsing, was a sufficient consideration to vest the property in them by relation back to the time of the indorsements, if they were afterwards made liable for the contents, and,

2d. "The plaintiffs did actually pay the full contents of the note as a consideration for it when they retired it from the bank; and this consideration has relation to the time of their indorsement." "Suppose the first indorser, Smith, had been the sufferer, could he not have recovered of Williams? yet he gave no consideration for it at the time. Suppose an ordinary accommodation note protested for non-payment, as to the maker, taken up by the indorser; cannot such indorser recover of the

maker? yet in no case of that kind, does such indorser pay a consideration for the note at the time of indorsement." These may be presumed to be the reasons for the judgment.

2. The next case cited is *Hixon v. Reed*, 2 Littell's Rep. 174, in the Court of Appeals of Kentucky.

Ward made his note to Reed, who indorsed it to Hixon, who indorsed it to the bank, who discounted it for the accommodation of Ward, the maker, who became insolvent. The note was duly protested so as to charge both indorsers, neither of whom received any consideration for his indorsement. The note was taken up by Reed, the payee and first indorser, who brought his action against Hixon, the second indorser, for one moiety of the money paid to the bank, and recovered in the court below. But that judgment was reversed in the Court of Appeals. The court cited the case of *Brown v. Motte*, 7 Johns. 361, with approbation, and said that if the plaintiff in error, the second indorser, had discharged the whole of the note to the bank, he could have recovered the full amount against the defendant, and consequently the defendant in error having first paid it, cannot be entitled to recover any part from the plaintiff.

3. The next case cited, is *Brown v. Motte*, 7 Johns. 361. Dean made his promissory note payable to the order of Motte, who indorsed it for the accommodation of the maker (Dean); but the person applied to, to discount the note, refused without another indorser. The plaintiff offered to indorse it for the maker, if he would pay him, out of the money to be obtained, \$250 which he owed him; which he agreed to do. The plaintiff then indorsed the note and received the \$250. The note never was in the possession of the defendant, and no consideration passed between him and the maker, or the plaintiff who knew that the defendant had indorsed the note solely for the accommodation of the maker. The note was duly protested, so as to charge the defendant. Verdict for the plaintiff, subject to opinion of the court on a case stating the above facts.

The court said:—"The defence is that the defendant indorsed the note for the mere accommodation of the maker, and that this fact was known to the plaintiff when he subsequently indorsed the note. This, however, is not, of itself, a defence. The indorser cannot set up that he indorsed the note without consideration, because by sending the note into circulation, by a general indorsement, and making it thereby a negotiable bill, a consideration is implied by the law merchant, and an inquiry into that fact is precluded. If there had been any fraud in the case, or the plaintiff had not made any advance upon the note, the taking it, under the knowledge stated in the case, would let

in a defence; or if he had purchased it or taken it up at a reduced price, it would seem that he could recover only the amount paid. *Wiffen v. Roberts*, 1 Esp. Rep. 261; *Brannan v. Hess*, 13 Johns. Rep. 52. But as the drawer (maker) "originally raised the money upon the note, with the indorsement of the present parties, the note must have been returned to the plaintiff by the subsequent holder, and he must have taken it up for the full value. He has, then, as good a right to resort to the defendant as a prior indorser, as if he had originally received it for its value. An indorser, for the accommodation of the maker, is entitled to all the privileges of an indorser, by being fixed in due season, (2 Caines's Rep. 243; 4 Cranch, 141; *Smith v. Becket*, 13 East, 187; *Brown v. Massey*, 15 East, 216); and he must be equally chargeable, as indorser, to the persons standing after him on the note." *Yeaton v. Bank of Alexandria*, 5 Cranch, 49; *Violett v. Patton*, 5 Cranch, 142. "The cases of *Smith v. Knox*, 3 Esp. Rep. 46, and *Charles v. Marsden*, 1 Taunt. 224, show that the principles of the commercial law are settled, that where there is no fraud in the case, and the indorsee has given full value for the bill, he shall recover of the acceptor, notwithstanding the bill was accepted without consideration, and for the accommodation of the drawer, and that fact was known to the indorsee when he took the bill, and though he even took the bill after it was due. It is impossible to distinguish this case in principle from those last mentioned, and the plaintiff is entitled to judgment."

When the court, in the above case of *Brown v. Motte*, said, "or the plaintiff had not made any advance on the note," they evidently alluded to the fact that the maker of the note was indebted to the plaintiff in the sum of \$250, and gave the note in payment, to that extent; so that as to so much of the note there was a good and valuable consideration as between the maker and the plaintiff; so that the latter was a *bonâ fide* holder for a valuable consideration to that extent; and therefore the defendant who had indorsed the note generally, to give credit to the note, and had put it in circulation as a negotiable bill, could not defend himself by the want of a consideration.

It is not necessary that the indorser should have received any thing; it is sufficient if the plaintiff has parted with any thing in consequence of the credit of the defendant's name upon the note.

This I take to be the argument of the Court upon that point. But the point in the opinion of the Court in that case which relates to the present case of *Magruder v. McDonald*, is, that the plaintiff, having taken up the note, had as good a right to resort to the defendant as if he had originally received it for its value.

4. The next case cited is *Wood v. Repold*, 3 Har. & Johns. Rep. 125.

Brown's bill of exchange on Gould, indorsed by Wood and by Repold for Brown's accommodation, and discounted by a bank in Baltimore, was taken up by Repold, the last indorser, who, by the judgment of the Court of Appeals of Maryland, (Buchanan, Polk, and Gantt, JJ., against Chase, C. J., and Earle, J.,) recovered the whole from Wood, the second indorser, there having been no communication between the indorsers at or before the time of indorsing.

Two grounds of defence were taken :—1st. That they were co-sureties ; and, 2d. That there was no consideration between them.

Buchanan, J., in delivering the opinion of the court, said :

" There is no doubt that two or more may jointly indorse a bill of exchange, and in such case each would be bound to contribute his just proportion of the amount ; but then the indorsement itself must be joint, and not several and distinct ; or, at least, to create, between two successive indorsers, a liability to contribution, there must be a correspondent understanding between them." " Every man, who signs an instrument of writing, is considered as understanding the nature of the obligation or contract into which he enters ; and, by his signature, subjects himself to the operation of the law governing such instruments."

After stating that co-sureties in a bond, whether they sign at the same or at different times, are liable to contribution, says : " But not so with respect to the indorsers of a bill of exchange. Every indorser is considered, in law, as a several and collateral security, and is as a drawer to his indorsee. An indorsement presupposes a consideration passing from the indorsee to the indorser, and of necessity precludes the presumption of a joint undertaking. For the law is consistent, and both presumptions cannot stand together." " I cannot, therefore, entertain the first objection ; but think that the indorsements of Wood and Repold must be considered as several and successive ; to be operated upon by the law regulating such transactions."

With regard to the second objection, the want of consideration between Wood and Repold, after observing that the want of consideration between immediate parties to a bill of exchange, whether for accommodation or not, is a good defence, says :— " But that principle, when tested by the established practice and settled forms of proceedings in actions on bills of exchange, will, I think, be found applicable only to that particular stage of the negotiation at which the bill is stopped in the hands of the party suing, who having never passed it away, has, consequently, been obliged to pay nothing upon it, nor has created any liability on himself to pay, and therefore can only recover, in virtue of a

consideration passed by him to the party from whom he received it; and in such case, it is that consideration alone which gives him a right of action. It does not apply to any party to a bill who, on its being protested, has been obliged to take it up; in which case it is not the consideration originally moving from him which entitles him to recover; but it is the subsequent payment alone on which the law raises the promise, and gives him a new cause of action; and he sues in the capacity in which he paid the bill, and not in that in which he received it."

These cases satisfy me that this Court was wrong in refusing a new trial, at December term, 1825, in the case of *McDonald v. Magruder*, (see the preceding case,) where the jury gave damages to the plaintiff for only one half of the note; the circumstances in that case being substantially the same as those in this, excepting that in that case McDonald had paid the whole, and being the last indorser, brought his action as indorsee against Magruder, his immediate indorser; whereas the present suit is by the indorser against his indorsee.

The form of the instrument is very material in determining the nature of the contract. The parties have adopted a form which, according to the law applicable to such instruments, makes the parties severally and successively, and not jointly liable, and which gives the holder a right to resort to all the preceding parties on the note. *Primâ facie* the indorsee has a right to recover the whole amount of the note from a prior indorser, and the burden of proof is on the defendant to show a different contract, and to rebut the evidence arising from the form of the instrument. The facts in this case do not show a different contract, and do not rebut the presumption.

The circumstance that both parties are accommodation indorsers is not evidence of a different contract. It is now settled that the rights of all the parties upon accommodation paper are the same as on transaction paper; with this single exception, that the person, for whose accommodation the paper was issued cannot defend himself by the want of demand and notice.

I am therefore of opinion that the judgment upon the case stated ought to be rendered for the defendant. But the other judges being of a different opinion, the judgment must be entered upon the verdict for the plaintiff.

Reversed by the Supreme Court, 3 Peters, 470.

W. ONEALE v. TIMOTHY CALDWELL, W. J. McCORMICK *et al.*

The statute of frauds, which requires that a declaration of trust of lands should be in writing, can be pleaded only by him who has the legal estate, and is sought to be charged with the trust.

A purchaser, under a decree for the sale of the real estate for deficiency of personal estate, will be authorized by the Court to redeem the property from a tax-sale, and will be allowed to deduct from the purchase-money, the amount paid for such redemption.

The purchaser under a decree of the Court is the "legal representative" of the proprietor, who was chargeable with the tax, and is entitled, within two years after the tax-sale, to redeem the property under the first provision of the 10th section of the City Charter of 1820, upon payment of the taxes and expenses of sale paid by the purchaser, with 10 per cent. per annum as interest thereon; and is not bound to pay for any improvements, nor for interest on taxes paid after the tax-sale.

The word "reinstatement" must be construed to apply as well to the "legal representative" of the proprietor charged with the tax, as to the proprietor himself.

A court of equity which decrees a sale of real estate has authority, in Washington county, to cause the purchaser under its decree to be put in possession by a writ of injunction, and if that be disobeyed by a writ of *habere facias possessionem*.

In this case, the Court, as a court of equity, having issued an injunction commanding the defendants to deliver possession of the land to the purchaser, under its decree, &c., the following statement of the case, and reasons for the decision of the Court, were drawn up, and communicated to the counsel of the parties, at their request, by CRANCH, C. J.

This was a bill in chancery, filed 11th June, 1822, by William Oneale, in behalf of himself and other creditors of the estate of Alexander McCormick, deceased, praying for a sale of the real estate for defect of personal assets; and charging that certain deeds, made by the said Alexander McCormick to the defendant Timothy Caldwell, were without consideration, and that Caldwell only held as trustee for McCormick and his heirs; that some of the defendants are infants, and that Caldwell resides out of this district.

All the defendants appeared by *Mr. Swann* their solicitor, and, as to so much of the bill as seeks to subject the property, upon the ground that it was conveyed by McCormick to Caldwell in trust for the use of McCormick and his heirs, pleaded the statute of frauds in bar, namely, that no action shall be brought whereby to charge any person upon any contract for the sale of lands, &c., or any interest in the same, unless the agreement be in writing; (29, c. 2, cl. 3, §§ 3 and 4,) and they charged that neither the said Alexander McCormick, nor any person for him, ever made any contract or agreement in writing, for the making, or declaring, or executing any such trust as is alleged in the bill.

That plea was filed 20th June, 1823, and not accompanied by any answer to the residue of the bill.

The COURT overruled the plea, thinking that the declaration of trust required by the statute, was a declaration to be made by Caldwell, and not a declaration by McCormick. Caldwell is the person sought to be charged by the trust, and the statute is a

defence to him only. An averment that McCormick made no declaration of trust is an immaterial averment.

The plea being overruled, and the residue of the bill, (that is, the part not covered by the plea,) being taken for confessed, (2 Mad. Chan. Pr. 295,) the Court, on the 5th of December, 1826, decreed a sale of the property, which was made on the 14th of March, 1827. Robert Leckie purchased lots twenty-six, twenty-seven, and twenty-eight in square seven hundred and twenty-nine, and D. D. Arden purchased lots three, five, and six, in square eight hundred and thirty-six, which sales were confirmed by the Court on the 14th of June, 1827.

On the 16th of June, 1827, Robert Leckie filed his petition, setting forth his purchase, and his compliance with the terms of sale, and that the defendants, the heirs of McCormick, refused to give him possession, and praying for the interposition of the Court to put him in possession. Whereupon the Court, on the same day, ordered them to show cause on the last Monday of October, why Mr. Leckie should not be put into possession, provided a copy of the order should be served on them, one month before that day. This rule was enlarged to the 2d of November, and further to the 12th of May, 1828.

On the 15th of May, 1827, Mr. Leckie had filed another petition stating that before the sale made under the decree of this Court, the property had been sold for taxes, and bought in by W. J. McCormick, one of the defendants; that the time for redemption had not expired, and praying that he might redeem and be allowed the amount out of his notes given for the purchase-money. That the defendant W. J. McCormick, administrator of the intestate, had assets, out of which he ought to have paid the taxes, but he suffered the lots to be sold, and bought them in, himself.

Upon this petition, the Court, on the 15th of May, 1827, ordered that upon Mr. Leckie's paying all the amount of taxes, and all costs and charges thereon, and filing a receipt for the same with the clerk of this Court, and with the trustee, he should have a credit therefor on his first note.

On the 6th of June, 1828, the rule to show cause why Mr. Leckie should not be put into possession, came on to be heard, and was argued by *Mr. Wallach* and *Mr. Barrell* for Mr. Leckie, and by *Mr. Swann* for the defendants.

For the defendants it was alleged, that the decree was only for sale and conveyance, not for possession; that the Court had no jurisdiction to order the marshal to give possession. That W. J. McCormick claims under the tax-sale, and that Mr. Leckie had only paid up the taxes and costs, with ten per cent. on the

taxes due at the time of the tax-sale, and the taxes which had since accrued, and which had been paid by W. J. McCormick, but had not paid the ten per cent. interest upon \$23.84 which was the amount of the taxes so paid by W. J. McCormick since the tax-sale; nor had Mr. Leckie paid him \$120.41, expended by him for improvements made since the tax-sale and within the two years allowed for redemption. The sale for taxes was made on the 14th of June, 1825. The taxes and expenses, with ten per cent. per annum thereon, were paid by Leckie to the register of the city on the 13th of June, 1827. The defendant McCormick claims the property in his own right, and avers that he has a right to receive a deed from the Mayor of the city, under the tax-sale, because Mr. Leckie had not paid the interest on the \$23.84, and the \$120.41 for improvements.

The right of Mr. W. J. McCormick is placed by his counsel, upon the construction of the tenth section of the city charter of 1820, by which it is provided, "That if, within two years from the day of any such sale" &c. "the proprietor or proprietors of any property which shall have been so sold" (for taxes) "his, her, or their heirs, agents, or legal representatives, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten per cent. per annum, as interest thereon, or make a tender thereof, or shall deposit the same in the hands of the mayor of the city or other officer of the corporation appointed to receive the same, for the use of such purchaser," &c., "he, she, or they, shall be reinstated in his, her, or their original right and title, as if no such sale had been made."

And provided also, "that minors, mortgagees, and others having equitable interests in real property which shall be sold for taxes as aforesaid, shall be allowed one year after such minor's coming to, or being of, full age; or after such mortgagees, or others having equitable interests, obtaining possession of, or a decree for the sale of, such property, to redeem the property so sold, from the purchaser or purchasers, his, her, or their assigns, on paying the amount of purchase-money, so paid therefor, with ten per cent. interest thereon as aforesaid, and all the taxes which have been paid thereon by the purchaser or his assignees, between the day of sale and the period of such redemption with ten per cent. interest on the amount of such taxes; and also the full value of the improvements which may have been made or erected on such property by the purchaser or his assigns while the same was in his or her possession."

It is contended that Mr. Leckie could not redeem under the first of those provisos because he was not the proprietor at the time of the tax-sale, nor the "legal representative" of such pro-

prietor; and that the only effect of redemption is to reinstate the proprietor, his heir or legal representative in his original right and title as if no such sale had been made; and therefore if Mr. Leckie can redeem at all, it must be under the second proviso in favor of minors, mortgagees, and others having equitable interests; and before he can redeem under that clause, he must pay the interest upon the \$23.84 paid by Mr. McCormick for taxes accruing since the tax-sale; and the \$120.41 for improvements made while the property was in his possession.

It seemed, however, to the Court, that the second proviso is cumulative, not exclusive. That it was meant to give to minors, &c., an additional privilege, not to prevent them from redeeming under the first proviso. It was intended that if, by reason of their minority, or by being mortgagees not in possession, or by having equitable interests only, they should be prevented from redeeming within the two years under the first proviso, they might redeem after the expiration of the two years, as soon as their disability should be removed. The second proviso does not prevent a minor, or mortgagee, &c., from redeeming under the first. If Mr. Leckie can redeem at all, it must be under the first proviso; for he is not a minor, nor a mortgagee, nor a person having an equitable interest. By the decree of the Court the legal title was sold. Mr. Leckie became the purchaser, and might maintain his action of ejectment. He was the "legal representative" of the proprietor within the meaning of the first proviso. The tax-sale does not deprive the proprietor of his legal estate. The freehold or seisin in fact and in law, remain in him until the expiration of the two years allowed for redemption. Until that time, the purchaser has no title at law or in equity. It is only an inchoate estate; a contingent interest; an incumbrance to the extent of the taxes, and expenses of sale. If the proprietor, within the two years, sell the property, the vendee is either as the proprietor, or as the legal representative of the proprietor, entitled to redeem. It cannot be intended, by the act, that upon repayment to the purchaser at the tax-sale, of the taxes, interest, and expenses, by the vendee of the original proprietor, the vendor, (the original proprietor,) should be reinstated in his original title, so as to defeat his intermediate sale; for the law authorizes the "legal representative" of the original proprietor to redeem, and declares that he (the legal representative) shall be reinstated in his original right and title, "as if no such" (tax) "sale had been made." It is evident that the intention of the law was that the right acquired by the purchaser at the tax-sale by paying into the city treasury the taxes and expenses of sale, should become void by the repayment, within the two

years, of the taxes, interest, and expenses, by any person claiming title to the lot sold; so that the title should remain just as it would have been, if no sale had been made. The word "reinstated," it is true, does not, with strict accuracy apply to a person who has purchased the right of the original proprietor after the tax-sale; yet, as the law says that the legal representative of the proprietor shall be reinstated in his original right, it is clear that the legislature meant to vest in the legal representative, all the right which would have been reinvested in the proprietor, if the redemption-money had been paid by him, instead of his legal representative; and that they did not intend to restrict the word "reinstated" to its literal meaning; for if they did, the legal representative could, in no case be benefited under the act, by the redemption. The literal meaning of the word "reinstated" would confine the redemption to him in whom the title was at the time of the tax-sale, although the redemption-money were paid by his vendee. The legal representative is to have the same right and title, after the redemption, as he would have had if no such tax-sale had been made. This is the clear meaning of the act; and the word "reinstated" must be construed consistently with, and cannot control that meaning.

The Court of Chancery had authority to decree a sale of the lots. It had as full power to order the sale as Caldwell, the trustee, and McCormick, the *cestui que trust*, if he had been alive, would have had. A sale under the decree transferred the legal estate as completely, as if it had been conveyed by them. Like the title under a sheriff's sale, by *fiery facias*, the title under the decree passes by the sale, without any deed of conveyance. The sale conveyed all the title of all the parties to the suit. Mr. Leckie, the purchaser at that sale, was then the legal representative of the proprietor, within the meaning of the first proviso in the tenth section of the charter, and had (especially by the leave and order of the court,) a right to redeem. If he had a right to redeem, the redemption enured to his benefit by the express words of the proviso.

I have said that the privileges allowed to minors, mortgagees, &c., by the second proviso of that section, are cumulative to those allowed by the first proviso.

This, I think, is apparent from the reason of the case, and from the words of the proviso. It is not reasonable to suppose that the legislature meant to put infants in a worse situation than adults. Such a supposition would be contrary to the spirit of the common law, and the whole tenor of legislation; and no reason can be given why they should not be allowed to redeem within the two years, as well as adults. If they should redeem

within the two years, they would not be obliged to pay for any improvements; not only because the law expressly authorizes redemption upon the repayment of the taxes and expenses and ten per cent. interest only, but because the purchaser under such tax-sale is not presumed nor permitted, by virtue of the sale, to take possession of the property, nor had he any legal title thereto; so that if, before the expiration of the two years, he should by any means obtain possession and make improvements, he would make them at his own peril. But if no redemption be made within the two years, and the purchaser at the tax-sale pay up the balance of the purchase-money and obtain a deed, and make improvements, then it is reasonable that any person, who is by law permitted to redeem after the two years, should pay for any improvements which the purchaser should have made after the expiration of the two years, and after his title had become complete at law; or, in the words of the second proviso, "while the same was in his possession;" the legislature not having contemplated that he could obtain the possession until the two years should have expired.

By the words of this proviso, the minor coming to redeem must not only pay the taxes and expenses, and ten per cent. interest thereon, but must pay the amount of purchase-money so paid for, with ten per cent. interest thereon, and all the taxes that have been paid thereon by the purchaser, or his assigns, between the day of sale and the period of redemption, with ten per cent. interest on the amount of such taxes, and also the full value of the improvements which may have been made or erected on such property by the purchaser, or his assigns, while the same was in his or their possession."

The person, who redeems under the second proviso, must pay the purchase-money so paid therefor. Until the expiration of the two years, nothing is to be paid by the purchaser but the taxes and expenses of sale. The purchase-money, as such, is not to be paid until the two years have elapsed. "The purchase-money so paid therefor" must, therefore, include not only the taxes and expenses of sale, paid at the time of the sale, but the residue of the purchase-money paid after the two years. This shows that the second proviso only applies to such as come to redeem after the expiration of the two years. A proprietor who seeks to redeem within the two years, therefore, cannot be at all affected by the second proviso, and consequently cannot, under that proviso, be obliged to pay for any improvements, nor for the interest upon the taxes paid by the purchaser after the sale.

The non-payment by Mr. Leckie for those improvements and

Hastings v. Granberry.

that interest, therefore, is no reason why he should not be put into possession of the property which he has purchased.

But it is said that the decree of the Court is for the sale and conveyance of the property only, not for the possession; and that the defendants cannot be in contempt for not delivering up the possession.

The COURT, however, was of opinion that its power to decree a sale of the property included a power to compel all the parties to submit to such decree, and to carry it into effect; and on the 6th of June, 1828, an injunction was issued by the Court, commanding the defendants and all other persons to deliver the possession to Mr. Leckie. This injunction having been served and disobeyed, and it having been suggested that Mrs. McCormick, the widow of the intestate, was entitled to dower, a commission was issued, by order of the Court and consent of parties, on the 14th of June, 1828, to assign her dower, which was returned executed; and the report of the commissioners assigning her dower was, on the 21st of June, 1828, confirmed by the Court; and, upon the authority of the case of *Garretson v. Cole*, 1 Har. & Johns. 389, a writ of *habere facias possessionem* was ordered, agreeably to the form adopted by the Chancellor in that case; which is not exactly the form of the common-law writ, but was framed by the Chancellor to suit the occasion. See the Maryland Act of 1785, c. 72, § 27.

HASTINGS *et al.* v. GRANBERRY *et al.*

This Court, at Washington, cannot decree the sale of the lands of an intestate, if any of the heirs are non-resident infants.

Quære, whether this Court, as a court of chancery, can decree partition or sale of the real estate of an intestate, under the Maryland Act of Descents, (1786, c. 45, § 8) ?

A decree must be according to the *allegata* as well as *probata*.

THIS was a bill in chancery, filed May 19, 1825, by the widow and adult heirs of John Granberry, against his infant heirs; stating that John Granberry, of Norfolk, died seized of lots 2, 3, 4, and 5, in square 249, in the City of Washington, and praying that the lots may be divided among the complainants, if divisible without loss, &c., and, if not so divisible, that they may be sold, and the proceeds divided among the complainants, &c., and that a commission may issue "to five discreet, sensible men," to inquire whether the estate may be divided without loss, &c., to ascertain the value, and to divide the same if divisible, &c.,

and, if not, to report, &c., "agreeably to the Act of Assembly in such case made and provided." And as the said minors reside out of the jurisdiction of this Court, the complainants or petitioners pray that a guardian may be appointed, to appear and answer; or that a commission may issue to three persons, to appoint a guardian, &c., and for further relief. And the widow, Susanna Granberry, states that she is the mother and natural guardian of the defendants; that her husband left no other means for the support of the children; and prays that she may receive their share, to be applied to their support.

The bill does not state that John Granberry died seized of an estate of inheritance, nor does the widow ask that her dower may be assigned.

On the same day a commission was issued to appoint a guardian, and to take the answers of the infants, which was done and returned, July 8, 1825. By their answer they assent to the prayer of the bill.

On the 12th of April, 1826, a commission was issued to five persons, to make partition, &c., if, &c., (having due regard to the widow's dower,) and if not, &c., to report, &c., and the value, &c., "according to the Act of Assembly in such case made and provided."

On the 26th of April, 1826, the commissioners gave notice to the complainants that they should proceed to execute the commission on the 10th May, 1826; on which day they reported that the land could not be divided without loss, &c., and gave their reasons, and valued the land at \$480, and laid off the widow's dower, and assigned her lot 5, during her life.

On the 13th of January, 1827, the Court ratified and confirmed the report; the widow filed her assent in writing that the land should be sold free of her dower, upon receiving a compensation. The heirs, who were of full age, refused to take the land at the valuation, and it was sold by the commissioners, and the Court allowed her one ninth of the purchase-money in lieu of her dower.

CRANCH, C. J., after stating the case as above, delivered the following opinion:—

The Court is now moved to ratify the sale; and, as non-resident infants are concerned, it is proper that the Court should be well ascertained of its authority to sell their interest in the land, so that they may not be unjustly deprived of their estate, and that the purchasers under the decree of this Court, or under the authority of the commissioners, may be safe.

The first question is, whether, under the eighth section of the Act of Descents of Maryland, (1786, c. 45, § 8,) a sale can be

made of the interest of a non-resident infant in lands lying in this county, which descended to the infant?

The words of that section are general, namely:—“In case the parties entitled to the intestate's estate cannot agree upon the division thereof, or in case any person entitled to any part be a minor, the court of the county where the estate lies shall issue a commission, to ascertain whether the estate can be divided without loss, and to ascertain the value, and to make partition if it can be done without loss; or to sell it if it cannot be so divided, and if none of the heirs will take it at the appraisement.” The sale is to be made under the direction of the commissioners, and the purchase-money to be justly divided among those entitled thereto; but by the Act of 1797, c. 114, § 6, the sale is not valid until ratified by the Court.

There is nothing in the Act of 1786 which excepts the interests of non-resident infants from its operation. The proceeding is *in rem*; the land is to be divided or sold. It is, therefore, no objection to say that the court has no jurisdiction over the person of the non-resident infant, unless the non-residence of the infant should take away the power which is given to the court by the latter part of the eighth section, where the expression is also general, that “if any minor shall be interested, who hath not a guardian, the court from which the commission issued shall appoint a guardian for the purpose.” Yet the fifth section of the Act of 1797, c. 114, says:—“And whereas it is doubtful whether or not there is any method of proceeding whereby a person holding land, jointly or in common with an infant residing out of the State, may obtain partition of the said land, Be it enacted that, on a bill filed for the purpose of obtaining partition of land, held jointly or in common with an infant residing out of the State, the chancellor, on the complainant's motion, may direct a commission to issue to three persons, such as he shall approve, authorizing them, or any two of them, to go to the infant and appoint a guardian, for the purpose of answering and defending the suit. And authorizing them, likewise, to take the answer and return it to the court; and, on receiving such answer, there may be the same proceedings as if the defendant had been regularly summoned, and had been heard by guardian appointed by the court.”

The doubt, thus expressed, is only as to the power to make partition; yet it must have been equally doubtful whether there was a power to make sale of the land of a non-resident infant; for the power to make partition under the Act of 1786, is co-extensive with the power to make sale, and any doubt as to one, must have extended to the other.

Perhaps it may be said that the 12th section of the Act of 1785, c. 72, gives the chancellor the power to decree a sale of the lands of a non-resident infant. The words are, "That in case any infant, idiot, or person *non compos mentis*, hath, or shall hereafter have, a joint interest, or interest in common, with any other person or persons," "in any lands" &c. "and it shall appear to the chancellor, upon application of any of the parties concerned, and upon appearance of the infant," &c. "as aforesaid, and hearing and examination of all the circumstances, that it will be for the interest and advantage, both of the infant," &c. "and of the other person or persons concerned, to sell such lands," &c. or any part thereof, the chancellor may order, and direct such lands," &c. "to be sold," &c.

The expression here also is general, "any infant," which comprehends non-resident infants. But the expression is equally general in the 8th section of the Act of 1794, c. 60, "That in case any infant," &c. "hath, or shall hereafter have a joint interest, or interest in common, with any other person or persons," "in any lands," &c. and it shall appear "to the chancellor upon application of any of the parties concerned, and upon the appearance of the infant by guardian to be appointed by the chancellor for that purpose, and for the purpose of answering and defending on the part of such infant," &c. "and upon hearing and examining all circumstances, that it will be for the interest and advantage of all persons concerned, to make partition of such lands," &c. "the chancellor may order and decree partition" "in the same manner, and under the same regulations as if all parties were of full age; yet the Act of 1797, c. 114, § 5, shows that such doubts were entertained of the power of the chancellor to decree partition of the land of a non-resident infant, as to induce the legislature to pass a law to remove them. Here, again, the power to make partition was co-extensive with the power to make sale, and the doubt as to the former was equally applicable to the latter. The legislature removed the doubt as to partition, but not as to sale; so that it now remains quite as "doubtful whether or not there is any method of proceeding whereby a person holding land jointly or in common with," a non-resident infant, may obtain a sale of the land, as it did in 1797, whether he could obtain partition.

Perhaps it may be said that this doubt has been removed by the Act of 1799, c. 79, § 4, by which it is enacted, "That if any bill in chancery hath been, or shall be filed against an infant out of the State, there shall, at the chancellor's discretion, be the same proceedings, and the chancellor may decree as if the infant were of full age."

But if the infant defendant and all the other parties were of full age, the chancellor would have no power to decree a sale of the land against the will of either of the parties. He could only decree partition.

The doubt expressed in the Act of 1797, c. 114, § 5, was probably the doubt of the chancellor himself, who had well considered the Act of 1786, c. 45, § 8, as well as the several acts enlarging his powers as chancellor, and his general jurisdiction in equity. It may, therefore, be considered a reasonable doubt, and I do not think that a court of law or of equity should order the sale of an infant's real estate, upon doubtful authority.

There are also other objections to the ratification of the sale. The bill is of a doubtful character. It is addressed to the court, as a court of chancery, yet it seeks relief under the Act of 1786, c. 45, § 8, which gives relief in a court of law only, unless the land lies in two or more counties, which is not the case here. It does not aver that John Granberry died seized of an estate of inheritance; so that it does not appear that the complainants have any interest in the land. It seeks to have the land divided among the complainants, to the exclusion of the infants.

The widow, (although one of the complainants,) does not ask for dower, nor aver that she is entitled to it.

It is a general principle that the decree for a plaintiff must be according to the *allegata*, as well as the *probata*, and must be consistent with the prayer of the bill.

For these reasons, I think, the sale ought not to be ratified.

THRUSTON, J., and MORSELL, J., concurred.

OTT'S ADMINISTRATOR v. THOMAS MURRAY.

A judgment may be kept alive by taking out a *fiery facias* within the year and day, to lie in the office, and so from year to year; and a *fiery facias* taken out within the last year and day, and put into the marshal's hands, may be executed, and if returned *nulla bona*, a new execution may at any time thereafter be taken out without *scire facias*.

MOTION by *Mr. Morfit* to quash the execution in this case, because not issued within the year and day after judgment.

The judgment was rendered January 9, 1824; a *fiery facias* to lie in the office was issued, returnable to April Term, 1824, and so on, from year to year, until September, 1826, when a *fiery facias* was issued, and returned *nulla bona* at December Term, 1826.

The present execution (a *fiery facias*) was issued, returnable to this May Term, 1828.

To show that a *fiery facias*, not returned, cannot be continued on the Roll, *Mr. Morfit* cited *Blayer v. Baldwin*, 2 Wils. 82; *Leshner v. Gehr*, 1 Dall. 330; *Brand v. Mears*, 3 T. R. 388, and 2 Tidd, 1004.

Mr. Wallach, for the plaintiff, relied upon the practice in the courts in Maryland, to take out an execution within the year and day, to lie in the clerk's office, and to be renewed from year to year, to keep the judgment alive.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.) The Court is of opinion that an execution, taken out and ordered to lie in the office, is sufficient to keep alive the judgment for one year; and if, within the year and day thereafter, another execution be taken out in like manner, to lie in the office, it will keep alive the judgment for another year; and so from year to year, and a *fiery facias* taken out within the last year and day, and put into the marshal's hands, may be executed; and if returned *nulla bona*, a new execution may, at any time thereafter, be taken out without *scire facias*, according to the opinion of this Court in the case of *Riggs and Gaither v. Barron*, at May Term, 1826, [2 Cranch, C. C. 678.]

The cases cited from 1 Dallas, 330, and 3 T. R. 388, are cases of *testatum fi. fa.* and are not applicable to the present case. The case in 2 Wils. 82, supports the present opinion; for in that case the first execution was never put into the hands of the sheriff and no other execution was taken out for more than a year and a day after issuing the first execution, and it was irregular to enter the continuance by *vicecomes non misit breve*, as the first execution was not returned nor filed.

LAW v. LAW.

The proceeds of the sale of an equitable title to land, are equitable, not legal assets.

IN EQUITY. The case was submitted to the Court upon the following statement.

Mr. John Law, in his lifetime, bought a lot on Pennsylvania Avenue, in Washington, at public sale, to be paid for by instalments. Some were paid, but not all; and although he built upon the lot, and lived in the house, he never received a deed for it; but his assigns will receive one as soon as the last instalment is paid.

The question was whether the proceeds of the sale of the lot in the hands of the trustee, under a decree of this Court upon a

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creditor's bill, were legal or equitable assets; and consequently whether the judgment creditors were to be paid before those by simple contract or specialty. See 2 Fonblanque, 401, in notes, and *Sharpe v. Lord Scarborough*, 4 Ves. 538.

CRANCH, C. J. We are of opinion that the proceeds of the sale of Mr. J. Law's equitable interest in the lot of land, in the hands of the trustee who made the sale, are equitable, not legal assets, inasmuch as the legal estate never was in him; and therefore it is not like the case of a mortgagor who has an equity of redemption; and who, upon the mortgage-money being paid, is reinvested with the legal estate without any reconveyance from the mortgagee. It is said that a judgment creditor has a right to redeem the mortgage, and by paying the mortgage-money, the legal estate reverts to the mortgagor, so that the judgment is a legal lien upon the lands, subject to the mortgage, as in the case of *Sharpe v. Earl of Scarborough*, cited above.

THRUSTON, J. absent.

HAYMAN v. KEALLY *et al.*

In a suit upon a creditor's bill charging the real estate of the intestate for deficiency of the personal assets, the answer of the administrator, and his account settled with the Orphans' Court, are *prima facie* evidence of the insufficiency of the personal estate, against the answers of the infant defendants, who do not pretend to any personal knowledge upon the subject.

An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed.

It is no bar in equity, to the statute of limitations, that the plaintiff could not proceed against the real estate until the personal was exhausted, or the deficiency of personal assets ascertained.

If the plaintiff's right of action is barred at law by the statute of limitations, it is barred in equity.

The principle that the statute of limitations will not protect trustees, applies only to express, not to constructive trusts.

If the statute of limitations begins to run in the lifetime of the intestate, it is not interrupted by his death, and the want of administration.

THE bill contained the usual averments in a creditor's bill. The defendants, in their answers, relied on the statute of limitations, and the infant heirs denied that the personal assets were insufficient to pay all the debts.

Mr. Redin, for the plaintiff contended, that as the answers, relying on the statute of limitations, were not filed within three months after the day of appearance, according to the 6th and 10th rules of practice prescribed by the Supreme Court, they were too late, and in analogy to the practice at law, ought not to be received.

He also contended that as the plaintiff's right to proceed in

equity against the real estate, did not accrue until the insufficiency of the personal estate was ascertained, which could not be before the administrator had settled his account with the Orphans' Court, which he was not obliged to do until a year after the death of the intestate, the statute was not a bar in this case; that, at least, the statute did not continue to run after the intestate's death, until the insufficiency of the personal estate was ascertained.

That the heirs at law are trustees for the creditors, and that the statute does not run in favor of trustees.

That the administrator's account settled with the Orphans' Court, and his answer, are *prima facie* evidence of the deficiency of personal assets, even against the answers of the infant heirs, who have no personal knowledge upon the subject.

In support of these positions he cited *Tyler v. Bowie*, 4 Har. & Johns. 332; *Girt's Adm'r v. Cockie & Fendall*, 7 Har. & Johns. 134; Bac. Ab., Limitations, E. 5, p. 474, 480; *Joliffe v. Pitt*, 2 Vern. 695; *Webster v. Webster*, 10 Ves. 92; *Parker v. Passet*, 1 Har. & Johns. 337.

Mr. Marbury, contra. The answers were in time, as they were filed before the bill was taken for confessed. (See Rule 18.)

There is no case to show that the statute ever stops after it has once begun to run, unless where the defendant dies pending the action. *Harwood v. Rawlings*, 4 Har. & Johns. 126; *Duval v. Green*, 4 Harr. & Johns. 270.

The rule that the statute of limitations is no bar to a trust, applies only to express technical trusts; not to implied trusts.

Mr. Redin, in reply, cited *Hickman v. Walker*, Willes' Rep. 27; *Smith v. Hill*, 1 Wils. 134; *Grey v. Mentz*; *Doe v. Jones*, 4 T. R. 300; 2 Starkie, 901; 3 Starkie, 1090.

CRANCH, C. J., delivered the opinion of the Court.

THE COURT (*nem. con.*) is of opinion, that the answer of the administrator, his inventory, and account settled in the Orphans' Court, are *prima facie* evidence against the answer of the infants, who do not pretend to have personal knowledge of the fact.

That the allegation of the defendants that they rely on the statute of limitations in lieu of a plea, was made in due time; that is, before the bill was taken for confessed against them. That the statute began to run as soon as the plaintiff's cause of action accrued against Daniel Keally the intestate; and it is of no importance that the plaintiff's right to proceed in equity did not accrue until the death of the intestate, and until it was ascertained that the personal estate was insufficient. If the plaintiff's right of action was barred at law, it is barred in equity. That

the plaintiff's right of action was barred at law by the act of limitations; and that the doctrine, that the statute of limitations is no bar to a trust, applies only to express, not constructive trusts.

To show that the plaintiff's claim was not barred by the statute of limitations, the counsel for the plaintiff cited *Bac. Ab.*, tit. Limitations, E. 5, and the cases of *Joliffe v. Pitt and Whistler*, 2 Vern. 694, and *Webster v. Webster*, 10 Ves. 92.

The first case cited from Bacon's Abridgment is *Curry v. Stephenson*, (Carth. 335; S. C. Salk. 421,) the facts of which case appear, by a note of the editor, to be misrecited. As stated by Bacon, it seems as if the statute of limitations had begun to run in the lifetime of the intestate, and that the court decided that the administrator had the whole six years after the date of his letters of administration to commence his action in. But by the note it appears that the statute had not begun to run in the lifetime of the intestate; so that the case does not support the principle for which it was cited. In *Carthew*, 335, it appears that the money was received by the defendant after the death of the intestate, and before letters of administration granted.

The next case cited is *Joliffe v. Pitt and Whistler*, 2 Vern. 694, in which it is said, by the reporter, to have been agreed that "it is expressly excepted out of the statute when the party who has a right of action is beyond sea; nor can laches be attributable to him for not suing while there was no executor against whom he could bring his action;" and "that the Lord Chancellor inclined to be of opinion that the statute of limitations was not to take place."

In that case the debt was contracted in Tripoli in Africa; both parties residing there. The creditor, in 1702, came to England, and took out his *latitat* against the debtor, which was continued on the roll till 1706, when the debtor died in the East Indies; and his executor came to England in 1710, and proved the will. The creditor abandoned his suit at law, which was probably abated by the defendant's death, and brought his bill in equity against the executor on the 8th of May, 1714. The other creditors, who were made defendants, insisted on the statute of limitations.

Here it is evident that the statute did not begin to run in favor of the debtor or his executor until the latter came to England in 1710, which was only four years before the plaintiff filed his bill; and that is the reason why "the Lord Chancellor was inclined to the opinion that the statute of limitations did not take place." The case, therefore, does not support the principle for which it was cited.

Shankland v. The Corporation of Washington.

In the case of *Webster v. Webster*, cited from 10 Ves. 92, it is said that "the Lord Chancellor objected, that as there was no representation till 1802, there was no person who could be sued, and therefore the statute could not be pleaded;" in support of which was cited the case of *Joliffe v. Pitt and Whistler*, 2 Vern. 694, which, we have before seen, is not an adjudged case to that point. The Chancellor, however, was of opinion in the case of *Webster v. Webster*, that as the defendant had possessed himself of the goods of the testator before letters testamentary were granted, he might have been sued as executor *de son tort*, and therefore allowed the plea.

In Bac. Ab., tit. Limitations, E. 6, cases are cited to show that where the courts of justice are shut, so that the plaintiff cannot sue, yet the statute of limitations, if it begin to run before the shutting of the courts, continues to run during the time they remain shut; and that principle is recognized in the case of *Beckford v. Wade*, 17 Ves. 93. We think, therefore, the principle is not established, that the operation of the statute, if it begin to run in the lifetime of the intestate, is suspended, or interrupted, by the death of the intestate, and the want of administration.

The plaintiff's bill, therefore, must be dismissed, but without costs.

ALEX'R B. SHANKLAND v. THE CORPORATION OF WASHINGTON.

The Corporation of Washington is not liable to the holder of a sub-ticket, or part of a ticket, for any part of the prize drawn by the ticket. It is only liable to the holder of the whole ticket.

THIS case is fully stated in the following opinion of the Court, given by CRANCH, C. J., (THRUSTON, J., not sitting in the cause.)

This is an action of assumpsit for money had and received, to recover one half of the amount of the prize of \$25,000, drawn by ticket No. 5591 in the 5th class of the Washington lottery. The plaintiff produced the same evidence which was produced in the case of *Clark v. The Corporation of Washington*, 12 Wheaton, 40, except the ticket which drew the prize; which ticket in the present case, namely, No. 5591, was, after the drawing, given up to the managers as a cancelled prize ticket by D. Gillespie, who received from the managers, in consideration thereof, an equivalent in notes of purchasers of tickets in the lottery, which had been deposited with the managers by Gillespie as stated in Mr. Webb's deposition. The plaintiff further proved by the testimony of the same Mr. Webb, that, as clerk of the said D. Gillespie, he was in the habit of selling whole tickets,

half tickets, and quarter tickets, in the 5th class of the said lottery, and that as such clerk, he sold to the plaintiff one half of the ticket No. 5591. That the said ticket No. 5591 was duly signed by the managers. The defendants waived the necessity of producing upon the trial the original ticket No. 5591, and agreed that it is in their possession, and that its form, excepting its number, is like that produced in Clark's case. Mr. Webb, after he had sold one half of the ticket, No. 5591, to the plaintiff, issued a sub-ticket in these words and figures, namely :

“ National Lottery — 5th class.

“ No. 5591. This ticket will entitle the possessor to one half of such prize as may be drawn to its number, if demanded within twelve months after the completion of the drawing, subject to a deduction of fifteen per cent.; payable sixty days after the drawing is finished. Washington City, Feb. 1, 1821.

“ $\frac{1}{2}$ 5591.”

“ D. GILLESPIE,
per J. F. WEBB.”

It did not contain the names of the managers, nor any allusion to them; nor any evidence that, in making such sub-ticket, D. Gillespie acted as the agent of the managers, or of the corporation. It was further proved that the ticket No. 5591 drew a prize of \$25,000, on the 33d day's drawing; that payment of half of the prize was, in due time, demanded at the office of the mayor of Washington, who was absent, and of the register of the city, and of the managers, all of whom refused payment. That Mr. Webb sent to the plaintiff a list of the 33d day's drawing.

It was agreed that the printed copy of the scheme, given in evidence, is a true copy of the real scheme by which the lottery was drawn; and that the drawing was commenced on the 27th November, 1821, and was completed on the 2d of January, 1823. That the Court shall decide what of the said evidence is admissible, and shall judge upon such as they shall decide to be admissible as if it were a demurrer to evidence, and draw all the inferences of fact which a jury could draw, and shall say what sum the plaintiff shall recover, if entitled to recover upon such evidence, and judgment shall be entered accordingly; and if the Court should be of opinion that the plaintiff is not entitled to recover, then judgment shall be entered for the defendants.

Upon this evidence, supposing it all to be admissible, the Court is of opinion that the plaintiff is not entitled to recover.

By the by-law of 22d May, 1821, all the lottery tickets were to be signed by the president of the managers. This sub-ticket was not so signed. It purported to be the private agreement of D. Gillespie to pay to the holder thereof one-half of the prize

which should be drawn by the ticket No. 5591, which Gillespie retained in his own possession. It did not bear on its face the names of the managers, nor in any manner allude to them. The advertisements, which were signed by the managers, did not authorize the sale of half tickets; nor is there any evidence that they authorized Gillespie to multiply the responsibilities of the corporation to an indefinite extent by dividing the tickets. By requiring that all the tickets should be signed by the president of the managers, they clearly intended to limit their responsibility to such tickets only as should be so signed. We think that D. Gillespie had no better right than any other person who purchased a whole ticket, to sell a share in it, and thereby make the corporation liable to such shareholder.

It does not appear that the managers, at the time they received the ticket No. 5591 from Gillespie, as a cancelled prize-ticket, knew that he had sold a share of the prize to the plaintiff, or to any other person; and it is to be inferred that they gave up to Gillespie, in exchange for this prize, its full value in other securities which they held. They may be considered, therefore, as having paid this prize to the holder of the ticket, without notice of the plaintiff's interest therein; and therefore the plaintiff has no right to recover in this action for money had and received, which is in the nature of a suit in equity.

Upon the whole, therefore, we think that no contract, express or implied, is made out by the evidence, which will support this action.

Affirmed by the Supreme Court, 5 Peters, 390.

BANK OF THE UNITED STATES v. JOHN M. MOORE.

The plaintiff, who is not an indorsee of the note, has no right, at the trial, to strike out the words of a special indorsement written over the name of the indorser, so as to convert it into a blank indorsement; and upon such an indorsement the plaintiff cannot recover, although he afterward obtain the indorsement of the indorsee to himself; because he can only recover in that action according to his right of action at the commencement of his suit.

ASSUMPSIT against the indorser of Josiah Meigs's note for \$250, indorsed in full to the President, Directors, and Company of the Bank of Columbia, but not indorsed by that bank to the plaintiffs.

At the trial, the plaintiffs' counsel, *Mr. Lear*, without the knowledge of the defendant or the leave of the Court, erased the words written over the name of John D. Moore, the indorser, so

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as to leave it a blank indorsement. But the Court being of opinion that the plaintiffs' counsel had no right to strike out those words, a juror was withdrawn, and the cause continued; after which the plaintiffs obtained the blank indorsement of the Bank of Columbia, by its president, in this form: — "The President, Directors, and Company of the Bank of Columbia, by Nathaniel Frye, Jr., President."

The declaration was amended with the leave of the Court, by inserting an averment that Moore indorsed the note to the Bank of Columbia, who indorsed it to the plaintiffs.

The COURT delivered the following opinion, (*nem. con.*): —

Upon the above state of the case, the Court is of opinion that the plaintiffs cannot recover in this action. The indorsement to the Bank of Columbia, the then last indorsee, being filled up before the commencement of the suit, the Bank of the United States had no legal cause of action upon the note when the suit was brought. The subsequent indorsement by Mr. Frye, as president of the Bank of Columbia, (if he had authority to indorse it, on which point the Court gives no opinion,) did not alter the plaintiffs' legal cause of action at the time the suit was brought. It could only authorize a new action; and, even if it would support this suit, it was not filled up when offered in evidence upon the last trial.

SAWYER *v.* MORTE, and W. BRENT, his Garnishee.

A mere equitable interest in lands is not liable to attachment and condemnation, by way of execution, under the Maryland law of 1715, c. 40.

Under the statute of 5 Geo. 2, respecting lands in the plantations, the legal estate only was liable to execution at law.

The cases of *Campbell v. Morris*, *Pratt v. Law and Campbell*, and *Ford v. Philpot*, considered.

THIS case was submitted by *Mr. Morfit*, the plaintiff's counsel.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., doubting.)

This is an attachment, by way of execution, under the statute of Maryland, 1715, c. 40, upon a judgment obtained by the plaintiff against Mortè, and was laid upon real estate, the legal title to which is in the garnishee, W. Brent, and never was in Mortè.

The garnishee answers to interrogatories, that he holds the land to indemnify himself against certain responsibilities which he had assumed for Mortè, and that the value of the property is probably more than sufficient for his indemnification. The motion now is for judgment of condemnation.

In support of this motion, *Mr. Morfit*, for the plaintiff, has cited the cases of *Campbell v. Morris*, 3 Har. & McHenry, 535; *Ford v. Philpot*, 5 Har. & Johns. 316; and *Pratt et al. v. Law and Campbell*, 9 Cranch, 496.

In the case of *Campbell v. Morris*, 3 Har. & Johns. 535, the opinion of the General Court of Maryland was, decidedly, that an equity of redemption was not liable to this process of attachment. That case was reversed by the Court of Appeals; but as that court did not give the reasons of their opinion, and as it was strongly argued by the appellant's counsel that Mr. Morris had a legal estate, because it was covenanted in the mortgage that Mr. Morris should retain the possession and enjoy the profits until forfeiture of the mortgage, it may reasonably be presumed that the Court of Appeals decided the cause upon that ground, and not upon the doctrine that a mere equity was liable to attachment. This presumption was corroborated by the facts stated by Mr. P. B. Key, in arguing the case of *Pratt et al. v. Law and Campbell*, 9 Cranch, 479, 486; and the letter of the chief judge of the Court of Appeals, explaining the grounds of that judgment, in which it appears that it was the legal, not the equitable estate, which they considered liable to condemnation, and in which he says:—"But upon this," (meaning the question whether an attachment would lie for the mortgagor's interest,) "the judges gave no opinion."

By the construction which the courts of Maryland had uniformly given to the British statute of 5 Geo. 2, c. 7, making lands in the plantations and colonies liable for debts, nothing but the legal estate is liable to execution at law. The rule is the same in England. *Plunkett v. Penson*, 2 Atk. 292; *Shirley v. Watts*, 3 Atk. 200; *Burden v. Kennedy*, 3 Atk. 379. And the Act of Assembly of Maryland, 1794, c. 60, § 10, is founded upon that known and acknowledged rule of law. That statute recites, that "Whereas it often occurs that persons against whom judgments or decrees are obtained hold or possess, or claim lands, tenements, and hereditaments, by equitable title only, and the creditor or creditors of such persons are often without remedy, either at law or in equity," and then proceeds to give the chancellor power to decree the sale of the equitable title, and to give the purchaser all the remedies which the person had whose equitable title is thus sold. That this rule of law was well established is manifested by the statute of Maryland, 1810, c. 60, (passed since the separation of this district from that State, and consequently never in force here,) which, for the first time, subjected equitable estates to legal process.

In the case of *Ford v. Philpot*, 5 Har. & Johns. 316, the Court

of Appeals, in the year 1821, decided that the equity of redemption of a mortgagor was liable to attachment and condemnation, and passed by a sale under the *fiери facias*, in the year 1789. The court, in giving its opinion, leaned upon the cases of *Campbell v. Morris*, and *Pratt et al. v. Law and Campbell*, neither of which cases seems to us to support the decision.

We have already seen that, in the former of those cases, the court went upon the assumption that Mr. Morris had an estate at law; and, in the latter case, the Supreme Court of the United States say, "We are not now at liberty to enter into the consideration of that question." It is evident that they considered the Court of Appeals in Maryland as having conclusively settled the question, so far as it affected that case, although it may not have settled it as to other cases. They considered the Maryland court as having decided that Mr. Morris had such an interest as was liable to attachment; and that, although that court might have erred as to the nature of the estate which Mr. Morris held, yet, as the judgment of that court remained in full force, and could not be reversed, it was conclusive in that cause. The Supreme Court of the United States did not undertake to decide whether the Court of Appeals erred as to the nature of the interest of Mr. Morris, or in the principle of law which that court thought applicable to the case.

But the case of *Ford v. Philpot* was a case of mortgage, in which, for all purposes, except as security for the debt to the mortgagee, and subject to that incumbrance, the mortgagor is in law considered as the owner of the property; and if the mortgage-money be paid, the estate becomes again absolute and perfect in the mortgagor, without any reconveyance from the mortgagee.

The equity of redemption is so far considered a legal estate as to be, in a manner, bound by a judgment against the mortgagor, so that a judgment creditor is entitled to redeem.

But, in the present case, Mr. Mortè, the debtor, never had the legal estate; and this difference was thought, by this Court, at this term, in the case of *Law v. Law*, sufficient to authorize the Court to decide that the proceeds of the sales of an equitable interest of a vendee were equitable, and not legal assets, and were not bound by a judgment against the vendee. Whatever, therefore, might be the weight which this Court might allow to the authority of the case of *Ford v. Philpot*, decided since the separation of this district from the State of Maryland, we do not think it decisive of the present.

There is another objection to condemnation in this case. The responsibilities of Mr. Brent, the garnishee, are not so defi-

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nite that we can exactly know what they are ; nor does it appear certainly whether he is not still liable for Mr. Mortè upon the government contract ; and we have, perhaps, no jurisdiction to ascertain the fact. The plaintiff's remedy being, therefore, to say the least, doubtful at law, and very clear in equity, where all persons interested may be made parties, and where the rights of all may be protected and enforced, we think it safest to follow what we consider as the old rule of law in Maryland, that a mere equitable interest in lands is not liable to attachment and condemnation, under the attachment laws of that State, as they existed when they were adopted as the laws of this part of the district.

The motion for condemnation, therefore, is overruled, and the attachment quashed.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1828, AT WASHINGTON.

ADJOURNED FROM MAY TERM, 1828.

THOMPSON MAY *v.* HENRY T. BAYNE.

Two justices of the peace cannot bind out an apprentice while the Orphans' Court is in session.

PETITION by an apprentice to be discharged.

Mr. Ashton, for the petitioner.

The justices had no right to bind him out. The father was a resident of Alexandria County, and not poor or indigent. He might, under the 3d section of the Maryland Act of 1793, c. 45, have bound out his son, but he has not done so. His assent was not absolute; but on condition that he could agree with the master as to the terms. Besides, the Orphans' Court was in session on that day, and the justices had no jurisdiction. (See the Maryland law of 1794, c. 47, § 1.) The indentures are dated June 7th, 1826, and were on the same day recorded in the Orphans' Court, but there is no evidence that the court saw or approved them.

Mr. R. S. Coxe, contra. It is not necessary that the Orphans' Court should not be in session, although that court should have been in session on that day, yet it does not appear that it was in session at the very time the indentures were executed. As the father did not reside in the county, his assent was not necessary.

The COURT, (*nem. con.*) was of opinion that as the Orphans' Court was in session on the 6th, and adjourned to, and actually sat on the 7th of June, the justices of the peace had no jurisdiction. The petitioner was discharged.

BUCKNER THRUSTON *v.* THOMAS MUSTIN.

A tenant for 99 years, renewable forever, with leave to purchase the reversion at a stipulated price, is liable to be restrained by injunction from cutting and selling young and green wood, where the wood constitutes the principal value of the land.

Thruston v. Mustin.

The statute of Gloucester, which gives the forfeiture of the thing wasted, and treble damages, is in force in the county of Washington, D. C., and the defendant in equity is not bound to discover the waste, unless the plaintiff in his bill, expressly waives the forfeiture and penalty.

BILL IN EQUITY to stay waste, filed 15th December, 1827.

The bill states that the plaintiff, on the 3d of November, 1825, demised to the defendant a farm called Pleasant Hills, in Washington county, for 99 years, renewable forever, at \$200 per annum, with the privilege in the defendant to purchase the fee-simple at \$40 per acre. That the defendant took possession on the 10th of January, 1826, and continues to reside thereon, "and has committed great waste on the said farm in cutting down the young and green wood thereon, and is now cutting down the same, and selling it in Georgetown;" "that the principal, or a material part of the value of the said farm consists in the wood, (the land being poor and unproductive,) as well for fencing and fuel as for ornament." That in leasing the land to the defendant, the plaintiff, from the apparent circumstances and ostensible property of the defendant, trusted in his ability and integrity to comply with the contract; but has since heard that the defendant is embarrassed in his circumstances; and the plaintiff "is in imminent danger of great loss by reason of the said waste," against which he has no security. That the plaintiff believes the defendant to be unable to purchase the fee-simple, and never intended to do so if able, and that his embarrassment existed at the time of the contract, "and was therefore guilty of a fraud towards the plaintiff, as well as by concealing the state of his affairs."

The bill prays for an injunction prohibiting the defendant "from cutting and selling the said wood, and from committing any other unreasonable waste on the said farm by cutting of wood or otherwise," and for general relief. To this bill the defendant demurs, because the plaintiff has not by his bill made such a case as entitles him in a court of equity to any discovery or relief.

And as to so much of the bill as seeks a discovery of the cutting and selling the young and green wood on the said farm, the defendant demurs, because if the estate of the defendant is not such as to entitle him to cut and sell the wood, the defendant may be made liable at law to a forfeiture which the plaintiff has not offered to waive.

And as to so much of the bill as seeks a discovery of the defendant's intention and ability to purchase the fee-simple, and his pecuniary circumstances, &c. the defendant demurs, because such discovery would be impertinent, and would not entitle the plaintiff to any relief.

And as to the charge of cutting and waste, and the discovery thereof, he demurs because the waste is not set forth with sufficient certainty, so that the Court can judge whether the cutting &c. be waste, and because the allegations are not sufficiently substantiated by affidavit, the certificate of the clerk being only that the bill "was sworn to" in open Court.

Mr. R. S. Coxe, for the defendant.

1st. There is no equity in the bill. The only fact alleged, is the cutting and selling some small wood. Waste is technical. The cutting must be of timber. The bill does not charge the cutting of timber; but only "young and green wood." The plaintiff made his bargain without requiring security, and this Court cannot make a bargain for him. There is no allegation that the rent has not been punctually paid. The defendant is not bound to answer any interrogatory not founded on some allegation in the bill. This Court cannot compel the defendant to give security which he has not stipulated to give. No relief can be granted upon the discovery asked for.

2d. If the defendant has committed waste, the estate is forfeited; and the defendant cannot be compelled to answer to that which might subject him to a forfeiture or penalty, (*United States v. Saline Bank of Virginia*, 1 Peters, 100,) unless the plaintiff expressly waive the forfeiture. *Botelov v. Allington*, 3 Atk. 457.

3d. The defendant, under a lease for 99 years, renewable forever, with leave to purchase the reversion at a certain price, is not impeachable for waste. He has a right to continue the estate forever, and to prevent the plaintiff from ever enjoying the reversion. The cutting, therefore, cannot injure the reversion.

Mr. Redin, contra. There is a sufficient averment of waste. The cutting of young and green wood for sale is waste, when the wood constitutes the principal value of the estate. *Downshire v. Sandys*, 6 Ves. 108. There the injunction was to prevent cutting of "saplings not proper to be felled." And in *Strathmore v. Bowes*, 2 Bro. C. C. 89, the injunction was extended to "young saplings and trees not fit to be cut." Like injunctions were likewise granted in *Chamberlyne v. Dummer*, 1 Bro. C. C. 166, and in *Obrien v. Obrien*, there cited. Underwood cut at unseasonable times, or destroying the germs, is also waste. Co. Lit. 53 a; *Burgess v. Lamb*, 16 Ves. 175; *Jackson v. Brown*, 7 Johns. 231. Cutting wood for sale is also waste. Co. Lit. 53 b; *Gore v. Eyre*, Cooper's Cases, 156; *Attorney-General v. Lord Stowell*, Anstruther, 601; 2 Haywood, 110, 339. It is waste to cut lightwood to make tar in North Carolina.

This tenant is impeachable for waste. The reversion is in the

plaintiff, and he has sufficient interest in it to authorize him to prevent waste. The relation of landlord and tenant still continues between the plaintiff and the defendant, notwithstanding the covenant to renew at the end of ninety-nine years, forever. By the common law the tenant must not commit waste. That law is in force here.

The case of *Calvert v. Garson*, 2 Sch. & Lef. 560, was adjudged upon the custom of the place; and the Chancellor, Redesdale, states the English law to be otherwise. The doctrine upon which that case was decided, namely, that tenant for life renewable forever, is not impeachable for waste, is peculiar to Ireland. Eden on Injunctions, 175. Even in case of vendor and vendee, upon an executory contract, the vendee will be restrained from waste until the purchase-money be paid. So in the case of mortgagor and mortgagee. The whole estate, wood as well as land, is bound for the debt. Eden, 116. It was not necessary to set forth the number, kind, and size of the trees cut. The affidavit goes to all the facts charged in the bill, and is sufficient foundation for the injunction. Eden, 324.

The forfeiture is waived by the plaintiff's bringing this bill; and if he should proceed at law for the forfeiture, or for the penalty, this Court would restrain him by injunction; and it could do no more if the plaintiff had, by his bill, expressly waived the penalty. An implied waiver is sufficient. *Woods v. Wall*, Anstruther, 100. A waiver in equity is no bar at law; it is only a ground for injunction. The want of a waiver is no ground of demurrer. The defendant is bound to answer; and may restrain the plaintiff by injunction from proceeding at law for the forfeiture. Eden, 329; and *Dodge v. Dickins*, in this Court.

Mr. Jones, on the same side. It is true this bill is not ancillary to a suit at law. It is a case for the original jurisdiction of this court as a court of equity. It is to prevent irreparable injury, and goes for ultimate relief. Cutting wood for sale is waste. The property itself is the security of the lessor, whether he be considered as lessor, or as vendor, and the tenant or vendee has no right to diminish it. If the plaintiff has been deceived as to the pecuniary ability of the vendee to pay, or if the security should turn out bad, a court of equity will restrain waste.

The demurrer is to the discovery only, because there is no express waiver of the forfeiture; but that is not a demurrer to the relief, which the facts if discovered or proved would authorize.

Mr. Coxe, in reply. If the principal or only value of the land is in its wood, it is not waste to cut and sell wood. How else is he to pay his rent? It is not waste to cut wood. *Jackson v. Brown*, 7 Johns. 231. No specific act of waste is stated

in the bill. It is not stated to be "not of a growth fit to be cut;" "nor saplings not proper to be felled;" nor "young timber;" nor "immature timber," as in the cases cited. Timber must be such as is fit for building. The case in Sch. & Lef. was not decided upon a local custom; but it was said that tenancies of that kind, namely, for life renewable forever, were peculiar to Ireland; but the same construction would be given to the same kind of estate in England. The chancellor speaks of "the local nature of that tenure." *Hyde v. Skinner*, 2 P. Williams, 196; 2 Cox's Ch. Ca. 174. In this country such leases are not discouraged. The relation of vendor and vendee does exist in this case. It is optional with the defendant. Here is no complaint of irreparable injury. The defendant had a right to sell wood to raise the purchase-money.

The defendant must demur to such part of the bill as he thinks himself not bound to answer; he cannot avail himself of the objection upon exception. If he submits to answer, he must answer fully.

CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J., not sitting.)

The first demurrer is to the whole bill, both as to discovery and relief.

Upon that demurrer the question is, whether the bill states a case proper for the intervention of a court of equity. It is admitted that a court of equity has jurisdiction to stay waste. Does the present bill aver waste? Waste is an act done to the injury of the inheritance: Is the cutting and selling of young and green wood such an act?

The bill calls it waste; and avers that the plaintiff is in imminent danger of great loss by reason of such waste; and that the principal value of the farm consists in the wood. These averments, taken together, seem to me to amount to an allegation that the cutting and selling of such young and green wood was an injury to the inheritance; and was, therefore, such waste as it would be proper in a court of equity to restrain.

But it is said that in such a lease, renewable forever, and with a right to purchase the reversion, the relation of landlord and tenant does not exist, inasmuch as it is in the power of the defendant to prevent the plaintiff and his heirs from ever enjoying the reversion.

But, until the defendant has actually purchased the reversion, it remains in the plaintiff, and the relation of landlord and tenant still subsists in full force.

The plaintiff, therefore, is entitled to relief. Is he also entitled to a discovery of the waste?

It is said that a court of equity will not compel a discovery of that which might subject the defendant to a forfeiture; and that the plaintiff may, in an action of waste, under the statute of Gloucester, have a judgment of forfeiture of the estate against the defendant, and treble damages. That the plaintiff has not waived nor offered to waive that forfeiture, and therefore a court of equity will not compel the defendant to discover the waste.

The statute of Gloucester, (6 Ed. 1, c. 5,) which gives the forfeiture of the thing wasted, and treble damages, is believed to have been "by experience found applicable to the local and other circumstances of the inhabitants of Maryland," and to have been adopted by the constitution and bill of rights of that State, and consequently to have become the law of this part of the district, by virtue of the Act of Congress of the 27th of February, 1801, [1 Stat. at Large, 103.]

That statute is stated, in Chancellor Kilty's report to the Legislature of Maryland, (p. 211,) to have been extended, in practice, to that State.

I am, therefore, of opinion that, if the defendant has committed waste, he is liable to the forfeiture of the thing wasted, and the treble damages.

The plaintiff has not, in his bill, expressly waived the forfeiture or the penalty. Is the defendant, then, bound to answer to the allegation of waste? Upon this point the case of *Botelov v. Allington*, 3 Atk. 457, was cited by the counsel of the defendant; in which case Lord Chancellor Hardwicke says, "There are two matters in question; one upon the demurrer as to the discovery of the acceptance of the second living; and as to that, I am of opinion that the plaintiff had a right to demur; not because it is of consequence to the plaintiff, for the fact of which he seeks a discovery may very easily be ascertained by the bishop's register, but for the sake of a rule of the court, that a defendant is not obliged, by a discovery, to subject himself to a forfeiture, or any thing in the nature of a forfeiture; and therefore in all bills to stay waste, a plaintiff is not entitled to a discovery, unless he waives the penalty, which is treble damages by the statute of Gloucester." See also Mitford's Pleadings, pp. 157, 158, 161, 3d Ed., and Cooper's Equity, 205, 207.

To this it is answered, that the forfeiture is in fact waived by the bringing of this bill. That the offer to waive would have been no bar at law to the action for the treble damages. That it would only have been a ground for an injunction to restrain the plaintiff from enforcing the penalty; and that the filing of this bill is equally a ground for an injunction; and that the defendant is now quite as safe against the penalty as he would have been if the plaintiff had expressly offered to waive it.

Burke v. Wheaton.

In support of this position, the counsel for the plaintiff cited the case of *Wools v. Wall*, Anstruther, 100, where, upon a bill for the single value of tithes, it was holden that it was not necessary for the plaintiff expressly to waive the treble value. I have not read that case, (not having the book,) but, as I understood it when read at the bar, the question did not arise upon demurrer to the discovery, but upon exception to the answer of the defendant, who had omitted to make the discovery sought by the bill, relying upon the general rule, that he was not bound to discover that which would subject him to a penalty. The Court, however, adjudged the answer to be insufficient, and compelled the discovery. This decision might have been upon the principle, at that time generally admitted, that if a defendant answer at all he must answer fully. There has been no case cited in which a demurrer, to the discovery of matter leading to a legal forfeiture or penalty, has been overruled, unless the plaintiff expressly waive that forfeiture or penalty.

I am, therefore, of opinion that the defendant in this case is not bound to answer the allegation of waste.

MORSELL, J., concurred.

BURKE *et al.* v. WHEATON.

The Court will appoint a committee here to take care of the property of a person found lunatic in Maryland.

The mode of ascertaining the lunacy is by a writ in nature of a writ *de lunatico inquirendo*.

THIS was a petition to the Court to appoint a committee of the estate of Major Wheaton, who was found lunatic in Baltimore; there being property in this county.

The Court will take notice of the proceedings of a foreign court finding a party lunatic. *Ex parte Otto Lewis*, 1 Ves. Sen. 298. In *Ex parte Gillam*, 2 Ves., Jr. 587, the Solicitor-General said, "For he had been found lunatic by a competent jurisdiction in the country in which he was. Lord Thurlow thought that a sufficient ground to consider him a lunatic; the country, which is alone the judge, having found him so."

"Lord Chancellor: That distinction I think a very sound one; for the personal capacity, in general, is regulated by the law of the country."

The reason why, in New York, a foreign inquisition is not sufficient, is, that the statute only authorizes the Chancellor to

appoint committees for those who should be found lunatic by that court.

The COURT (THRUSTON, J., absent,) appointed Dr. Laurie, committee. The Act of Maryland, 1785, c. 72, § 6, authorizes the Chancellor to superintend the affairs of lunatics, and to appoint a committee, &c., but does not direct the mode of ascertaining who are lunatics. This must be done by a writ in the nature of a writ *de lunatico inquirendo*, which issues by order of the Court upon affidavit.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1828, AT ALEXANDRIA.

GEORGE MURRAY *v.* HENRY R. DULANY.

In assault and battery, the plaintiff, being a mulatto, cannot, at the trial upon the general issue, be compelled to prove his freedom.

ASSAULT AND BATTERY. The plaintiff was a mulatto. *Mr. Wise*, for the defendant, contended that the plaintiff should prove his freedom.

But the COURT (*MORSELL*, J., absent,) said, that the defendant had waived the objection to the person of the plaintiff by pleading the general issue.

GEORGE H. SMOOT *v.* GIDEON BELL.

A guardian, appointed by the Orphans' Court, continues until the infant arrives at full age; and he has not a right, at the age of fourteen, to choose another.

A guardian, appointed in Alexandria, who was also appointed by the Orphans' Court in Pennsylvania, and gave bond there, is not bound to account in Alexandria, for money of his ward received in Pennsylvania.

THIS was an appeal from the sentence of the Orphans' Court in Alexandria, ordering the former guardian, G. H. Smoot, to pay over to the new guardian, Gideon Bell, chosen by the ward after the age of fourteen, money which Smoot had received in Pennsylvania under letters of guardianship taken out there, upon his giving bond and security to account there.

Mr. Taylor for the appellant.

The Orphans' Court in Alexandria has only the same powers which the Orphans' Court of Maryland have; and in the case of *Forrest and Mauro v. Ritchie*, in Washington, at May term, 1822, [*ante*, 147,] this Court decided that the Orphans' Court

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cannot appoint a new guardian upon the election of the ward at his age of fourteen; so that Mr. Bell is not guardian, and has no right to call Mr. Smoot to account.

Mr. Hewitt, contra, cited Toler, 134, which cites a case from Sergeant and Rawle; and contended that as Mr. Smoot had voluntarily charged himself with the money in his account with the Orphans' Court here, he is bound to account for it here.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows.

In this case it is admitted that Mr. Smoot was duly appointed by the Orphans' Court, guardian of the infant before his age of fourteen years. This appointment must have been made under the power given to that court by the Maryland law, which was in force on the 27th of February, 1801, when the Orphans' Courts of this district were erected. By that law of Maryland, the guardian appointed by the Orphans' Court is appointed until the infant arrive at the age of twenty-one, and the infant has no right, at the age of fourteen, to choose another. This point was decided by this Court at Washington, in the case of *Mauro and Forrest v. Ritchie*, about eighteen months ago. Mr. Smoot, therefore, still remains guardian, and Mr. Bell has no authority to call him to account.

The next question is, whether Mr. Smoot is bound to account to the Orphans' Court here for the funds which he received in Pennsylvania under his appointment there under the laws of Pennsylvania, and which he there bound himself to account for in the courts of Pennsylvania.

We think he is not bound to account to the Orphans' Court here for that fund, although, under a mistake of his obligation, he may have given credit for it in his first account with that court. In his second account he is credited with that fund, as having been improperly charged with it in his former account. In his third account he is again charged with it by the Orphans' Court, and is required to pay over the balance to Mr. Bell; from which order he, Mr. Smoot, has appealed to this Court.

We therefore think that the sentence of the Orphans' Court ought to be reversed, with costs.

REARDON v. MILLER.

Possession of a slave, under an absolute bill of sale, without notice of a prior bill of sale by the same vendor to a trustee, for the benefit of the vendor's wife and

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children, is adverse to the trustee, and, if continued five years, is a bar to his right of action, although the second deed was made with the consent of the vendor's wife.

DETINUE OF A SLAVE. Manly, in 1800, made a deed to Reardon of a slave called Henry Nokes, for the benefit of Manly's wife, and such children as he had, or should have, by her. The slave was then only one year old. In 1810 Manly, with the consent of his wife, sold the same slave to Mordecai Miller, the defendant, for \$250, as a slave for life, by an absolute bill of sale under seal, with warranty; but the former deed to Reardon was not known to Miller, who resided in Alexandria, although it was recorded in Virginia. Miller had possession of the slave from 1810 until the present time. He purchased this slave for the purpose of emancipating him at a future day.

Mr. Taylor, for the defendant, contended that the possession of Miller was adverse to the plaintiff, who, after the death of Mrs. Manly, brought this suit for the benefit of the children.

Mr. Mason, contra. The possession was not adverse to the plaintiff, claiming as trustee for the children. Until the death of Mrs. Manly the children could not sue, nor could their trustee.

The COURT (MORSELL, J., absent,) was divided in opinion upon the question, whether Mr. Miller's possession was adverse to the plaintiff's title.

CRANCH, C. J., thought it was. The defendant claimed to the extent of his title under the absolute deed, without notice, which title was clearly adverse to that of the plaintiff.

THRUSTON, J., *contra*, was of opinion that the plaintiff could not have maintained an action against the defendant during the life of Mrs. Manly, because the defendant received the possession with her assent, and, therefore, the defendant's possession must be considered as her possession; and a trustee cannot recover the possession from his *cestui que trust*.

The jury could not agree, and the cause was continued, and came on again for trial at the present term, when *Mr. Taylor*, for the defendant, prayed the Court to instruct the jury, that if they should be satisfied by the evidence, that the defendant had been in adverse possession of the slave for five years before the commencement of the suit, the plaintiff cannot recover in this action.

Which instruction the COURT (THRUSTON, J., *contra*,) gave; and further instructed the jury that such possession by Mr. Miller, claiming contrary to the deed of trust, and under his deed from John Manly, was, if proved in law, an adverse possession.

Bernard v. Herbert.

BERNARD v. HERBERT.

Detinue will lie for a slave, although the defendant obtained the possession tortiously.

DETINUE FOR A SLAVE.

Mr. Wise, for the defendant, prayed the Court to instruct the jury, that if the defendant obtained possession of the slave tortiously, the plaintiff cannot recover in this cause; and cited *Selw. N. P.*

Mr. Neale, for the plaintiff, was stopped by the COURT, who said that the plaintiff might waive the trespass, and refused to give the instruction.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1828, AT WASHINGTON.

FARMERS AND MECHANICS BANK *v.* GAITHER.

If the plaintiff be a trustee, the Court will not permit him to become *non-pros.* without the consent of the *cestui que trust*, if the latter will give security to indemnify the plaintiff from costs.

Mr. C. Cox, for the plaintiffs, moved to strike off this suit; that is, to become *non-pros.*

Mr. Marbury, contra. The notes of Gaither had been indorsed to the plaintiffs by W. W. Corcoran & Co., as collateral security for their debt to the plaintiffs, and, having paid their debt to the plaintiffs, W. W. C. & Co. directed the plaintiffs to pay over the proceeds, when collected, to Thomas Corcoran; which they agreed to do. Thomas Corcoran, therefore, has an interest in the proceeds of this suit, as security for his responsibility for W. W. Corcoran & Co. The plaintiffs have no interest in the suit, except as to the costs.

Mr. Key, contra.

The COURT (MORSELL, J., not sitting in the cause,) refused to permit the plaintiffs to strike off the suit, upon Mr. Thomas Corcoran's giving security to indemnify the plaintiffs against the costs.

MACOMBER *v.* CLARKE.

To enable a party to call upon the other party to produce papers at the trial, there must be an order of the Court upon the party to produce them; that order must be served a reasonable time before the time for producing them; and there must be reasonable notice, also, of the motion for the order.

When a juror is withdrawn on the motion of the plaintiff and consent of the defendant, who elects a continuance of the cause, he is not entitled to costs also.

Mr. R. S. Coxe, for the plaintiff, having given notice to the defendant to produce them, called for a certain letter and notice of demand and notice of protest.

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Mr. Morfit produced the defendant's affidavit, that he had searched diligently for the letter and could not find it. He contended that the defendant was not bound to produce the notice, as there had been no order of the Court to produce it, and no notice of a motion for such an order.

The COURT (THRUSTON, J., absent,) said that there must be an order of the Court for the production of the papers, which order must be served upon the party a reasonable time before the time for producing them; and that the party must have reasonable notice of the motion for the order.

On motion of *Mr. Coxe*, and with the assent of the defendant's counsel, a juror was withdrawn, and the cause continued; the Court said it must be without costs, as the defendant had elected a continuance.

WILLIAM SMITH v. JOHN CHASE.

Upon a jury trial before a justice of the peace, under the Act of Congress of March 1, 1823, "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," the justice is not bound to sign a bill of exceptions, as no writ of error, or appeal, will lie in such a case.

APPEAL from a justice of the peace, whose judgment was given upon the verdict of a jury summoned by his order, under the fifteenth and sixteenth sections of the Act of Congress of March 1, 1823, [3 Stat. at Large, 743,] "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia." At the trial, the defendant tendered a bill of exceptions to an opinion of the justice, upon a point of law, which the justice refused to sign, and a motion was now made to compel him to sign it.

Mr. Ashton, for the appellant, (the original defendant.) The statute of Westminster, (13 Ed. 1, c. 31,) applies to all courts whose judgments may be reversed by writ of error, or writ of false judgment. Bac. Ab. tit. Bill of Exceptions; 2 Inst. 427; 1 Arch. Practice, 230. The justice's court is a court of common law and of record; for, by the act of 1823, § 3, he is bound to keep a docket, and "therein to record and make regular entries of their proceedings," and they have power to fine and imprison for contempts.

Mr. Elkins, contra. A writ of error will only lie to a court originating from the common law. It does not lie to a court of summary jurisdiction. Tidd, c. 43. See the Maryland laws of 1715, c. 12; 1753, c. 13; 1757, c. 11; 1760, c. 10; 1763, c. 21;

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1791, c. 68 ; 1798, c. 70. These acts show that the justices' courts are statutory courts. They have no common-law jurisdiction. A *certiorari* only lies to such courts ; but a *certiorari* does not lie after issue joined and *venire* awarded. The third section of the Act of Congress only requires the justice to keep a docket, and therein record his proceedings. This does not make his court a court of record. He could certify nothing but a copy of his judgment.

Congress did not intend to give an appeal in cases tried by a jury. The trial by jury was given in lieu of an appeal. The justice is bound to give judgment according to the verdict.

Mr. Ashton, in reply. By the common law, in a jury-trial, the judge is obliged to give his opinion to the jury, if he be required so to do by either party.

By the seventh section of the act, an appeal is given in all cases where the debt or demand exceeds the sum of five dollars. No exception is made of cases tried by jury ; and *boni judicis est ampliare jurisdictionem*, to carry into effect the intention of the legislature.

The COURT, (*nem. con.* but THRUSTON, J., doubting,) was of opinion that a writ of error would not lie to the judgment of a justice of the peace upon the verdict of the jury, and that he was not bound to sign a bill of exceptions.

CRANCH, C. J. The Court is of opinion that the motion must be overruled.

Before I proceed to give the reasons which induce me to concur in the decision of the Court in this cause, it is proper that I should state that those reasons are exclusively my own, and that the Court is not responsible for them.

Several questions arise in this cause.

Does an appeal lie to this Court from the judgment of a justice of the peace, given upon the verdict of a jury ? If an appeal lies in such a case, in what manner shall the cause be tried here ? By the Court, or by a jury ? If this Court cannot reëxamine the fact here, can it reëxamine the law of the case ? And how is the question of law to be judicially brought before this Court, separated from the fact ? And how can this Court judicially know the facts upon which the question of law is to be raised ?

The jurisdiction given to justices of the peace in cases of small debts, is a special authority given by the statute. They have no civil common-law jurisdiction. Their cognizance of such causes is exclusive. No writ of error, nor *habeas corpus*, nor *certiorari*, will bring those causes into this court. *Hartley v. Hooker*, Cowper, 523.

By the 6th section of the act, the judges of this Court are expressly forbidden to hold original plea in cases within the jurisdiction of the justices of the peace; and it is only in cases of which the superior courts have concurrent jurisdiction with the inferior courts, that a writ of *habeas corpus cum causâ*, or of *certiorari* will lie, at common law, to remove the cause from the inferior to the superior court.

A writ of error lies only to a court of record, after judgment. It does not lie to the county court nor to the court of chancery, proceeding according to equity, because they are not courts of record. Co. Lit. 288, (b); Bro. Ab. Error, 95; 1 Roll. Ab. 744, G. 1, 2; 37, H. 6, 13.

"Wherever a new jurisdiction is erected by Act of Parliament, and the court or judge that exercises this jurisdiction acts as a court, or judge of record, according to the course of common law, a writ of error lies to their judgments; but where they act in a summary method, and in a new course different from the common law, there a writ of error lies not, but a *certiorari*." *Groenveldt v. Burwell*, 1 Salk. 200, 263, 396.

"Wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record." S. C. 1 Salk. 200, 396.

The jurisdiction given to justices of the peace, as single magistrates, being a new and special jurisdiction, to be exercised in a summary way, and not according to the course of the common law, a writ of error, at common law, would not lie to their judgments, nor a writ of false judgment; therefore a bill of exceptions could not be demanded under the statute of Westminster, 2, (13 Ed. 1, c. 31;) 2 Inst. 246. But whatever might be the jurisdiction of the superior courts of common law in England, this Court, which is the creature of the statute, can only exercise such jurisdiction as is given to it by the statute. Its appellate jurisdiction over the judgments of justices of the peace, is derived entirely from the 7th section of the Act of the 1st of March, 1823; by which it is enacted, "That in all cases where the debt or demand doth exceed the sum of five dollars, and either the plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace, he or she shall be at liberty to appeal to the next circuit court to be held in the county in which the said judgment shall have been rendered, before the judges thereof; who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to law and the right and equity of the matter;" "and either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election."

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The only means by which a cause can be brought up from the justice of the peace to this Court, is an appeal; which is a term, and mode of proceeding, borrowed from the civil law, and unknown to the common law. By the civil law an appeal brings up the whole cause, fact as well as law, to the appellate court; the judgment below is entirely vacated; the cause commences *de novo* in the appellate court, where the plaintiff, (or actor,) is allowed to make new allegations, and produce new evidence; "*non allegata allegare, et non probata probare.*"

That this is also the meaning of the term, and the effect of the process, as used in the statute, is evident from its provisions, that the court should in a summary way hear the allegations and proofs of the parties, and determine both the fact and the law of the case.

By the 15th and 16th sections of the act, when the sum demanded shall exceed twenty dollars, either of the parties, after issue joined, and before the justice shall proceed to inquire into the merits of the cause, may demand a trial by a jury, whereupon the justice is "required to issue a *venire*; and to swear the jury, well and truly to try the matter in difference between the parties, and a true verdict give according to evidence." "And the jury, being sworn, shall sit together and hear the proofs and allegations of the parties, in public, and when the same is gone through with, the justice shall administer to the constable" an oath to keep the jury together in a private room, &c., until they shall have agreed on their verdict, when they are to deliver the same publicly to the justice, who is "required to give judgment forthwith, thereon."

It will be perceived, that upon a demand of a trial by jury, the cause is taken entirely out of the hands of the justice. He is obliged to summon and swear the jury, and to render judgment according to their verdict. No authority is given him to instruct the jury upon matter of law or fact, nor to set aside their verdict and grant a new trial.¹ It seems to me that he acts as ministerially in entering the judgment upon the verdict, as the clerk of this Court does, in entering its judgments. The jury are not bound by the opinion of the justice upon matter of law; nor do I perceive that he has a right to say what evidence they shall hear. If they disregard his opinion as to the law, or hear evidence which he disapproves, no new trial can be granted. They

¹ Such was the limited authority of the steward in the Court-baron of the manor: and of the sheriff in the *torn*. See Erskine's argument (in the case of *Shipley*, Dean of St. Asaph,) on the rights of Juries. Vol. i. p. 155, N. York Ed. 1813.

are to try the matter in difference between the parties ; whether it be matter of law, or matter of fact. The jury seems to be a complete substitute for the justice, as to the trial of the cause. If a jury be not required by either party, the justice is to decide the fact as well as the law. If a jury be demanded, they are to decide the law as well as the fact.

The right of appeal is given only to him who may think himself aggrieved by the judgment of the justice ; not by the verdict of the jury. No man can think himself aggrieved by the judgment of a justice who exercises no judgment at all ; who has no discretion—no choice—no will ; but who is bound by law to enter up judgment according to the will of another.

The 7th section, which gives the right of appeal, declares the mode of proceeding thereupon in the appellate court. That mode of proceeding is coextensive with the right of appeal ; and if there be a case in which the appellate court cannot constitutionally proceed in that mode, it is fair to presume that the legislature did not mean to give an appeal in such a case. This construction of the statute seems to me not only reasonable in itself, but is the only construction which will make it consistent with the Constitution of the United States, the 7th amendment of which declares that “ No fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of common law.” The only appellate jurisdiction given to this Court is that which is given by the 7th section of the act ; and that is a summary jurisdiction ; not according to the rules of the common law. It is a jurisdiction to hear the allegations and proofs of the parties, and to determine upon the same, both as to fact and law ; unless either party should demand a trial by jury ; and to reëxamine a fact by a jury, in an appellate court, which has been once tried by a jury in the court below, is not according to the rules of the common law. By that law, a fact, once tried by a jury, cannot be reëxamined but in the same court by a new trial granted by that court. It would, therefore, be equally a violation of the Constitution if this Court should reëxamine the fact in a summary way, either with or without a jury. See *Parsons v. Bedford*, 3 Peters, 446, 447, 448.

As, therefore, the act has not given this Court any constitutional means of reëxamining the facts, in such a case ; and has given this Court appellate jurisdiction over the judgments of a justice of the peace, only by appeal, which brings up the facts as well as the law, I think there is strong ground to conclude that the legislature did not intend to give an appeal in any case where the cause should be tried by a jury in the court below.

Clarke v. Mayfield.

The position occupied by the 15th and 16th sections, (which is at the close of the act,) leads us to suppose that they were added as an amendment of the original bill as it was first drawn; and this is historically known to be the fact. The 7th section, when reported, did not contemplate a trial by jury before the justice. Although this circumstance is not a legitimate ground of construction, yet it corroborates the construction drawn from the language of the act itself, which, in its letter as well as its spirit, applies only to those cases in which the act of the justice is the real cause of the supposed grievance.

It is objected, that this construction of the act puts it in the power of either party to deprive the other of an appeal, by demanding a trial by jury before the justice. This is true, but it is because it makes a case in which an appeal is not given; the trial by jury being substituted for it. The one prevents what the other was intended to remedy, namely, the erroneous judgment of the justice.

Being, then, of opinion that an appeal, in this case, is not given by the statute; and that this Court has no common-law appellate jurisdiction to revise the judgments of justices of the peace, either by writ of error, writ of false judgment, *habeas corpus*, or *certiorari*,—I think the appellant has no right to require the justice to sign the bill of exceptions; that this Court cannot compel him to do so; and that the appeal should be dismissed, with costs.

BANK OF COLUMBIA v. GALLOWAY.

In an action for use and occupation, if the rent be payable quarterly, the plaintiff may recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was.

The same principle applies when the rent is payable yearly.

ACTION ON THE CASE, for use and occupation.

The COURT (*nem. con.*) instructed the jury, that if they should be satisfied by the evidence, that the rent was payable quarterly, the plaintiffs might recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was. And if the rent was payable yearly, the plaintiffs could not recover in this action for the year during which the eviction occurred; and that the plaintiffs could not recover rent which accrued after their assignment of the lease.

CLARKE v. MAYFIELD.

Upon the plea of the statute of limitations, the plaintiff cannot avail himself of the

Travers v. Ramsay.

exception in favor of merchants' accounts, without stating it in his replication. It is not admissible in evidence upon the general replication to the plea. After the jury is sworn, the Court will not suffer the plaintiff to amend, if the justice of the case be against him.

ASSUMPSIT FOR WORK AND LABOR. Plea of limitations ; general replication and issue.

Mr. R. P. Dunlop, for the plaintiff, offered evidence of mutual dealings and accounts between the parties, and cited Ballantine on Lim. 70, 71.

Mr. Redin, contra. That clause of the statute only applies to merchants, where there are mutual accounts and mutual credits.

The COURT (THRUSTON, J., absent,) said, that as the exception in favor of merchants' accounts is not stated by way of replication, the evidence could not be admitted. The replication is, that the cause of action accrued within three years, &c., and according to the decision of the Supreme Court in *Bell v. Morrison*, 1 Peters, 351, mutual accounts are not evidence on that issue.

Mr. Dunlop then moved for leave to withdraw a juror and amend his replication.

Mr. Redin objected, that it appears by the defendant's books of account, which he produced in court, that the plaintiff's whole claim has been paid ; but the books, being in his own handwriting, are not evidence.

The Court refused leave to amend under such circumstances. The plaintiff admits there were mutual accounts, and upon that ground moves to amend, and yet refuses to admit the defendant's books in evidence, although the defendant offered to waive the plea of limitations.

Verdict for plaintiff, \$30 ; which, being below the jurisdiction of this Court, the plaintiff took a *non-pros*.

JOHN TRAVERS v. R. T. RAMSAY.

If the vendor and vendee of chattels live together in the same house, the possession will be presumed to be and remain in the vendor until the contrary is shown. An absolute bill of sale of chattels is void as to creditors if the possession does not accompany and follow the deed.

REPLEVIN. Defence under an execution upon a judgment against George Travers, the plaintiff's father ; and that the bill of sale from the father was void as to creditors, because the possession remained with the father. The evidence was that the son, the plaintiff, lived in the same house with the father, and

 Smith v. Billing and Kennedy.

that no change of possession took place in consequence of the bill of sale.

The COURT (THRUSTON, J., absent,) instructed the jury that if the possession remained with the grantor, the deed was void as to creditors; and that if the title was in the father, the possession should be presumed to be in him also, at the time of the deed, unless the contrary should appear.

Mr. R. S. Coxe for the plaintiff.

Verdict for the defendant.

HARRINGTON v. McDUEL.

The plaintiff has a right to enter the defendant's house with the constable, who has a *fi. fa.*, to show the defendant's property, upon which to levy the execution.

ASSAULT AND BATTERY.

Mr. Hellen, for the defendant, prayed the Court to instruct the jury that the plaintiff had no right to enter the defendant's house with the constable, to show him the defendant's property, upon which to levy the *fieri facias* upon a judgment in favor of the plaintiff against the defendant.

But the COURT (*nem. con.*) refused.

Beale and *Ashton* for the plaintiff.

NATHAN SMITH, Administrator *de bonis non* of Robert Brown, v.
W. W. BILLING AND JAMES KENNEDY, Executors of Margaret Brown, who was Administratrix of Robert Brown.

The Orphans' Court set aside the administratrix's sale, as being fraudulent, and charged her with the goods at the appraised value. Held, that such charge did not vest the title of the goods in the administratrix in her own right.

The administrator *de bonis non* of R. B., and not the distributees of the estate of R. B., is his personal representative.

The Orphans' Court had no jurisdiction between the parties.

REPLEVIN for a slave, named Henry, and a clock, the plaintiff claiming them as unadministered assets of the estate of Robert Brown, of which estate his wife, the late Margaret Brown, deceased, was administratrix. Plea, property in the defendants; general replication and issue.

Mr. Wallach, for the defendants, offered in evidence a transcript of the record of the proceedings of the Orphans' Court, on the 1st of April, 1826, stating that, "Pursuant to an application made to this court," (the Orphans' Court,) "by the attorney for

the representatives of Robert Brown, deceased, claiming their respective portions of the residuary balance of his personal estate, summonses were issued to the securities of his administratrix, the late Margaret Brown, his widow, and against the executors of the said Margaret, now deceased, to appear before this court," (the Orphans' Court,) "on the 25th of March last, to show cause why the prayer of the applicants should not be granted; it being alleged by them that the said Margaret, administratrix of the said Robert Brown, in the administration of the estate of her deceased husband, had been guilty of fraud, which rendered her and her securities liable for the full amount of the appraisement of the personal goods, chattels, and effects of the said Robert Brown. The parties, except the securities of the said Margaret Brown, appearing, by mutual consent the case was postponed till Thursday, the 30th of March aforesaid, when the depositions of Thomas Donoho," and others, were taken and filed, tending to show that the sale of the personal estate was not fairly advertised, and that the administratrix fraudulently purchased the property at a price far below the appraisement. The Orphans' Court, after stating the testimony, proceeded thus:—"The court, therefore, is obliged to pronounce the sale which was thus made by the administratrix, to have been unfair and fraudulent; and further to pronounce, on the testimony of Nicholas Cassidy, that the articles purchased by him were bought especially and solely for the administratrix; and that the negroes were purchased by herself, at a price far below the appraisement, as proved by the last-mentioned deponent, and the account of sales, as furnished by the auctioneer, David Bates, and returned and sworn to by the administratrix, Margaret Brown.

"On a review of the above facts, the court is of opinion that the sale of the said goods, chattels, and effects of Robert Brown, deceased, by his administratrix, was without due notice, and was so made for the purpose of purchasing in the same at a price below their value or appraisement, for her own benefit; therefore she has incurred the penalty affixed to such a transaction by the Act of 1798, c. 101, and in the third section of the eighth chapter of said act; and, therefore, in the settlement of her accounts ought to have charged herself with the whole amount of the appraisement contained in the inventory. It is consequently decreed that the Register of Wills make out a statement, charging the administratrix aforesaid with the amount of said appraisement, and with all moneys received by her, and crediting her with the payments made by her, and that he allow her a commission of seven and a half per cent. on the amount of said

inventory, and of the moneys received by her; and that the balance appearing to be due by her be divided into two equal parts; one part being due to her, as her share of the residuary personal estate of her late husband, Robert Brown; the other part being due to the legal representatives of Robert Brown entitled to receive the same, each according to his rightful portion, on the 18th of February, 1817, that being the time, — as she had, in fact, made herself the purchaser, and liable for the full appraised value of the goods, chattels, and effects of the deceased, — when she might have finally closed her administration, having assets in her hands sufficient therefor.”

The counsel for the defendants contend that, by this decree of the Orphans’ Court, the title to the goods passed to her in her own right; and that she was, and her sureties were, and now are, liable to the distributees for their share of the balance; and if the plaintiff recovers in this action, which is brought for the use of the distributees, they may still recover against the sureties of the administratrix, and the recovery in this action would be no bar to that.

Mr. Coxe and Mr. Jones, contra. The decree passed no title. It only prevented the administratrix from having credit for the difference between the appraisement and the sale; and she only remains chargeable for the amount of the inventory, as she was originally. She never made another sale. The first sale was void. If she had afterwards sold it for more than the appraisement, she would have been liable for the surplus. If lost without her fault, she would be credited for the same, at the appraised value.

Mr. Key, in reply. She could not be thus credited, for the decree of the Orphans’ Court is conclusive against her. She is charged, absolutely, for the whole inventory; and it would be unjust to charge her unless the property became hers absolutely, and in her own right.

The COURT (*nem. con.*) instructed the jury, that the decree of the Orphans’ Court did not change the title of the property.

Mr. Key, for the defendants, then prayed the Court to instruct the jury, that the decree of the Orphans’ Court is void, because that court had not jurisdiction between the parties, namely, “the representatives of Robert Brown,” (not naming them,) against the executors of Margaret Brown, who was the administratrix of Robert Brown, and her “securities,” to set aside a credit claimed by her in her administration account, and to compel a distribution.

Mr. Coxe, contra. The decree is the defendants’ own evidence, and they cannot impeach it.

Pannill v. Eliason and Brown.

The COURT (*nem. con.*) was of opinion that the Orphans' Court had not jurisdiction of the cause; and that the decree was void, because it was *coram non judice*. The administrator *de bonis non* of Robert Brown was the only party who could call on the executors of Margaret Brown for the assets of the estate of Robert Brown, which came to the hands of Margaret Brown.

Verdict for the defendants. Motion for a new trial refused.

PANNILL v. ELIASON AND BROWN.

In a joint action against two, if one only be taken, and an *alias capias* issued against the other from term to term, and, before he be arrested, a deposition be taken on the part of the plaintiff, by consent of the defendant, who was first taken with an agreement that it should be read at the trial; and if, in the caption of the deposition, one only of the defendants be named, and afterwards the other be taken, the deposition may be read at the trial against both defendants.

An agent is a competent witness to prove his own authority as agent.

ASSUMPSIT against John Eliason and Joel Brown, joint merchants, trading under the firm of Eliason & Brown, for goods sold and delivered, &c.

While the suit was pending upon the docket, after the arrest of Eliason, and before that of Brown, who was not taken until several terms had elapsed after the arrest of Eliason, the deposition of one Thompson Cockerell was taken on the part of the plaintiff, by consent, with an agreement of counsel on the part of the plaintiff and the defendant Eliason, that it should be read in evidence at the trial. In the caption of the deposition the action was stated to be "*George Pannill v. John Eliason.*" Brown having been taken, and having pleaded, and the cause having come on to trial against both defendants,

Mr. C. C. Lee, for the plaintiff, offered to read the deposition in evidence to the jury.

Mr. Coxe and *Mr. Marbury* objected that it did not appear to be taken in this suit, which is against both; but purports to be taken in an action against Eliason only.

But the COURT (*THRUSTON, J.*, absent,) overruled the objection, and suffered the deposition to be read.

The defendants' counsel then contended that the witness was not competent to prove his own authority to sign receipts for wheat delivered by the plaintiff to the defendants. 1 Phil. on Ev. 95; 4 Starkie on Ev. 55, 1730.

But the COURT, (*nem. con.*) upon the authority cited in Paley on Agency, 245, said he was competent.

YOUNG AND QUEEN v. WETZELL AND MILLS.

A declaration by the defendants to the marshal, at the time of serving the writ, (which did not specify the cause of action, nor its amount,) that they would pay the debt if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act, is not sufficient to take the case out of the act of limitations, although the defendants were not arrested upon other judgments; but if the cause of action and its amount were mentioned to them at the time of such declaration, it may be left to the jury, and if they should find that the promise referred to that particular cause of action, it would be sufficient in law to take the case out of the statute.

ASSUMPSIT on a promissory note. Plea, limitations.

When arrested by the marshal, in this suit, and shown the writ, which did not designate the amount nor specify the cause of action, the defendants said to the marshal that they would pay the debt, if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act. They have not been so arrested.

The COURT (MORSELL, J., *contrà*,) instructed the jury, at the prayer of *Mr. Key*, for the defendant, that such acknowledgment was not sufficient to take the case out of the statute of limitations. See the case of *Bell v. Morrison*, 1 Peters, 351.

Mr. Woodward, the deputy-marshal, who served the writ, further testified that he had filed the note in the clerk's office, in this case, and he thinks he mentioned this note to them as the cause of action; he had no certain recollection that he did, but his impression is that he did.

The COURT (CRANCH, C. J., doubting,) said that the evidence might be left to the jury; and if they should be of opinion that the promise to pay referred to this cause of action, that promise was sufficient in law to take the case out of the statute.

 NEGRO PHILLIS CLAGETT AND CHILDREN v. ANN GIBSON.

A *feme covert*, who has sued for alimony, is so far to be considered a creditor of her husband as to make it competent for her, in a suit by his slaves for freedom, to show that her husband's deed of manumission, made pending the suit for alimony, and while he was prohibited by injunction from conveying away his property, was made in fraud of her rights; although he had, at the date of the deed of manumission, other property, more than sufficient to pay all the equitable or legal debts due by him to his wife, and left enough to pay the amount due to her.

A deed of manumission, by the husband, of his slaves, pending a suit by his wife for alimony, and made for the purpose of preventing her from recovering her claim, is fraudulent and void; but if only made to prevent her from obtaining, at his death,

Negro Clagett v. Gibson.

a distributive portion of his personal estate, such motive for making the deed is no ground for impeaching its validity.

The proceedings in the suit for alimony are competent evidence for the defendant in the suit of the negroes for their freedom.

PETITION FOR FREEDOM. The defendant, while the widow of Abraham Young, married one Gerard Gibson. The petitioners were her property at the time of her marriage with Gibson; and claimed their freedom under his deed of emancipation, dated October 31, 1826, duly acknowledged and recorded according to the Maryland Act of 1796, c. 67, § 29, by which he emancipates them to be free after his death.

The defendant had filed a petition to this Court against Gibson, her husband, for alimony, and obtained an injunction on the 10th of July, 1826, to prevent him from conveying away his property. This suit for alimony was pending at the date of the deed of manumission. He died in the following year.

Mr. Key, for the defendant, offered in evidence the transcript of the record in the suit for alimony, in order to show that the deed was made to prevent the defendant from obtaining a sentence for alimony.

Mr. Elkins and *Mr. Coxe*, for the petitioner, objected that it was *res inter alios acta*.

The COURT (*nem. con.*) permitted the record to be read in evidence only to show the existence and pendency of the suit for alimony.

Mr. Jones, for the defendant, contended that the defendant must be considered as a creditor of her husband, (having sued for alimony,) at the date of the deed of emancipation, and that the deed, being made in fraud of her rights, was void; and being "in prejudice of" a creditor, was also void as to her under the 29th section of the Act of 1796, c. 67. By filing the bill, she had a lien on all his property for her separate maintenance.

Mr. Coxe, contra. By a manumission by deed, the right of freedom vests *instantly*, although to take effect *in futuro*. It is otherwise in emancipation by will. The order for alimony was not made until the following March. The decree is only *in personam*; it created no lien on the property.

The COURT (*THRUSTON, J., contra.*) was of opinion, that the wife, at the date of the deed of manumission, ought to be considered as a creditor in equity, and it was therefore competent for her to show that the deed was made in fraud of her rights. She had a right to maintenance; she had claimed it in her petition; and whether it would be granted or not, was immaterial.

The Court also, at the prayer of the defendant's counsel, in-

Bank of Columbia v. McKenny.

structed the jury, that if they should be satisfied by the evidence that Gerard Gibson made the deed of manumission while the claim of his wife for alimony was pending, and for the purpose of preventing her from recovering her said claim, then such deed of manumission was fraudulent and void, and the petitioners are not entitled to their freedom under the said deed. But if the jury shall believe, from the evidence, that he made the said deed with the view of preventing her from obtaining, at his death, a distributive portion of his said property, such motive for making the said deed, is no ground for impeaching its validity.

Verdict for the defendant.

BANK OF COLUMBIA v. SAMUEL MCKENNY.

The belief of a witness, together with the facts upon which that belief is founded, is admissible evidence to the jury.

In June, 1819, the practice of the Bank of Columbia was, not to give out notes for protest until 3 o'clock, P. M., on the third day of grace.

The time for demand, notice, and protest of a promissory note discounted at a bank, depend upon the custom of the bank; and a person who indorses such a note, with the knowledge of the custom, is bound thereby.

ASSUMPSIT against the indorser of a promissory note, dated June 24, 1819, at 60 days.

Mr. Coxe and *Mr. Marbury*, for the defendant, objected to the question proposed to the notary who protested the note, whether from his recollection of the practice of the bank in giving out the notes for protest on the third day of grace, the date of the protest as stated in his notarial book was not a mistake, the date being on the second day of grace. The practice of the bank was, not to give out notes for protest until 3 o'clock, P. M., on the third day of grace.

The COURT (*THRUSTON, J., contra*,) was of opinion that the belief of the witness, accompanied by the facts upon which that belief was founded, was admissible in evidence to the jury.

Mr. Marbury, for the defendant; when a custom is once clearly proved and established, it is not necessary to prove it again in a subsequent suit. *Rabourg v. Bank of Columbia*, 1 Har. & Gill, 237; *Bank of Columbia v. Fitzhugh*, 1 Har. & Gill, 248.

Mr. Coxe, for the defendant, then prayed the Court to instruct the jury, that they "must be satisfied by the evidence, that the note was protested and notice given to the indorser on the fourth day of grace."

The COURT, (*THRUSTON, J., contra*,) refused.

The COURT (*THRUSTON, J., doubting or dissenting*,) instructed the jury, that if they should be satisfied by the evidence that

before and until the June term of this Court, 1818, it was the custom of the Bank of Columbia, and the other banks in this district, to demand payment of notes discounted in such banks, not before the fourth day after the day limited for the payment thereof on the face of the notes, and to give notice on the said fourth day, and that such usage was generally known, the jury may infer that this defendant, when he indorsed the note, had reference to such usage, and if they should so infer, then the said demand of payment of the said note by the maker thereof, and notice to the defendant of the non-payment thereof made and given on the 25th and 26th of August, 1819, were too soon, and did not make the defendant liable in this action as indorser of the said note; unless the jury should be satisfied by the evidence, that the custom and usage of the said bank, after the said June term, 1818, was so changed as to require payment of such notes to be demanded on the third day, and notice of non-payment given to indorsers on the fourth day after the day limited for the payment thereof on the face of the said notes, and that such change of the said custom of the said banks came to the knowledge of the defendant before, and was known to him at the time of his indorsement of the note upon which this suit is brought; in which case he may be presumed to have so indorsed in reference to the said last-mentioned custom; and if the jury should so find, then a demand of payment on the third day, and notice as aforesaid made and given on the fourth day after the day of payment expressed on the face of the note, were not too soon.



FOWLE v. BOWIE.

At any time before the fifth term, after the appearance term, the plaintiff may obtain a continuance of the cause upon affidavit that he has recently learned from his counsel that the documents upon which he relied are not good evidence for him, and that he wants the testimony of persons beyond sea, although a day, by consent of the parties, had been assigned for the trial.

Mr. Jones, for the plaintiff, moved for a continuance of the cause upon affidavit by the plaintiff, that he has but recently learned by consultation with his counsel, that certain documents upon which he had relied, were not good evidence for him; and that he wants the testimony of certain persons in Holland.

The cause was at issue at the last term, and this day had been assigned by the Court, with the consent of the parties, for the trial. This was the second term after the appearance court.

Mr. Key, for the defendant, objected.

 Pierson and Brent v. The Bank of Washington.

But the COURT (*nem. con.*) continued the cause, it not being after the fourth term after the appearance court. See Maryland law, 1721, ch. 14, § 1; 1730, ch. 16; 1787, ch. 9, § 2; 1794, c. 6, § 2.

BROWN, Administrator of Smith, v. GEORGE GILLES.

A *scire facias* to revive a judgment, on confession for damages only, in an action of debt, cannot be amended, if it is conformable to the judgment; nor can the judgment be amended upon *nul tiel record*, in *scire facias*.

Mr. Wallach, for the defendant, moved the Court to amend the original judgment and the *scire facias*, upon the plea of *nul tiel record*, and cited the following authorities: *Braswell v. Jeco*, 9 East, 316; *Patrick v. Wood*, 3 Bibb, 232; *Perkins v. Petit*, 2 B. P. 275; *Bucksome v. Hoskin*, 2 Lord Raym. 1057.

Mr. Key, *contrá*. The *scire facias* cannot be amended unless there be something to amend by. The *scire facias* is conformable to the judgment, which was confessed for damages only, in an action of debt. The issue is *nul tiel record*, but there is such a record of such a judgment. The *scire facias* is correct.

The Court awarded the execution.

PIERSON AND BRENT, Executors of Robert Brent, v. THE BANK OF WASHINGTON.

The Bank of Washington has a right, under the 11th section of its charter, to prevent a transfer upon its books, of a part of the bank stock of its debtor, until the debt should be paid, although the value of the stock should greatly exceed the amount of the debt.

ACTION ON THE CASE for damages for not permitting the plaintiffs, as executors of Robert Brent, to transfer to one John Coyle, 20 shares of stock in the Bank of Washington, standing in the name of their testator, which they had sold to Coyle for \$1,000.

The defendants justified under the 11th section of their charter of February 15, 1811, which enacts that the shares of the capital stock shall be transferable only on the books of the bank, "but all debts actually due and payable to the bank, (days of grace for payment being past,) by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary."

At the trial the plaintiffs took a bill of exceptions, which

stated, that the defendants gave in evidence their charter of February 15, 1811, and a judgment in their favor against the plaintiffs, as executors of the said Robert Brent, for \$1,001.75, with interest from the 18th of May, 1819, and offered evidence to prove that the bank at the time of the application for a transfer of the stock, claimed of the plaintiffs, as executors of the said R. Brent, more than the amount of the judgment, namely, about \$1,600, for which additional sum a suit in equity was then pending against the plaintiffs as executors. That when the plaintiffs demanded the transfer, they requested the bank to retain as much of the stock as would be amply sufficient to cover the debt which the bank claimed; but the bank refused to permit the transfer, believing that they had a right to do so by the 11th section of their charter.

The plaintiffs then gave in evidence the record of the proceedings, in which a decree was made in favor of the United States against them as executors of the said Robert Brent.

It was admitted, upon the trial, that the said Robert Brent, at the time of his death, held in the said bank the stock in the declaration mentioned, of the par value of \$13,000, and that "he died indebted to the United States in more than he was worth, and was at the time of his death insolvent."

Upon which the counsel for the defendants prayed the Court to instruct the jury, that if they believed the evidence aforesaid to be true, the plaintiff had no right to recover in this suit.

Mr. Worthington and *Mr. Swann*, for the plaintiffs, contended that it was unreasonable in the bank to refuse the transfer of \$1,000 only of stock, while they held stock to the amount of \$13,000; and that, as they demanded payment of more than was due, they could not make the payment of that whole claim the condition of permitting the transfer.

The COURT (*nem. con.*) refused to give the instruction as prayed; but instructed the jury that the evidence aforesaid was not sufficient in law to entitle the plaintiffs to recover in this action; and further instructed the jury, that if they should be satisfied by the evidence that the plaintiffs, as executors of the said Robert Brent, were, at the time when they demanded the transfer, indebted to the bank, the latter had a right, under the eleventh section of their charter, to refuse to suffer the transfer to be made. And although the bank may, at that time, have claimed more than was due, yet, if any thing was due, the plaintiffs should have tendered what they admitted to be due; and if nothing more was due than the amount tendered, the bank was wrong in refusing the transfer; if more was due, the bank was right.

Homans v. Coombe.

Mr. Worthington and *Mr. Swann*, for the plaintiffs, moved for a new trial: because the Court had refused evidence of malice in the defendants; and because the plaintiffs' testator died insolvent, and indebted to the United States, as a receiver of public money. And cited *Warne v. Varley*, 6 T. R. 443; *Seaman v. Patten*, 2 Cain. 312; *Imlay v. Sands*, 1 Cain. 566.

But the COURT stopped *Mr. Wallach*, in reply, and overruled the motion. (See *Panton v. Holland*, 17 Johns. 98, 99.)

LANGLEY v. BRENT.

A debt due by two joint debtors to two joint creditors cannot be set off as against a debt due by one of the joint creditors to one of the joint debtors.

ASSUMPSIT on the defendant's promissory note to the plaintiff. Langley and King rented a wharf from Brent and Pierson in 1822; Langley and King dissolved their partnership in 1824, indebted to Brent and Pierson in the sum of \$53.

The COURT decided that it could not be set-off in this action.

Mr. Morfit, for the plaintiff. *Mr. Worthington*, for the defendant.

HENDERSON v. CASTEEL.

Where the plaintiff holds the affirmative of any of the issues in a cause, he has a right to open and close the whole case.

Upon the plea of property, the plaintiff in replevin has the burden of proof, and the right to open and close.

REPLEVIN. Plea, — property in the defendant; general replication, and issue.

The COURT (THRUSTON, J. absent,) said, that whenever the issue was joined upon the right of property, the burden of proof, on that issue, is upon the plaintiff, and he has a right to open and close the case; and that when the plaintiff holds the affirmative of any issue, he has a right to open and close, although there may be other issues in which the affirmative is holden by the defendant.

DANIEL HOMANS v. G. COOMBE, Garnishee of Zantzinger.

The lien which a builder, in Washington, has under the Act of Maryland, 1791, c. 45, § 10, is a remedy in rem only, and not in personam.

The lien commences with the recording of the contract for building, and does not overreach prior incumbrances.

ATTACHMENT, by way of execution, upon a judgment recovered by Homans against Zantzinger, for balance due upon a building contract. The attachment was served upon credits in the hands of G. Coombe, who was summoned as garnishee, and pleaded *nulla bona*. The building contract was dated 17th September, 1816, but not acknowledged and recorded until the 14th of May, 1817. The deed of trust, under which Mr. Coombe purchased the house, was executed on the 9th of May, 1817, five days before the acknowledgment of the building contract. The plaintiff had, within two years after the last of the work was done, proceeded at law, by an action against Mr. Zantzinger, upon the contract, and, on the 22d of June, 1819, recovered the judgment upon which this attachment was issued, by way of execution, under the Act of Maryland of 1715, c. 40. Mr. Coombe had paid his purchase-money to the trustee, who sold the house under the deed of the 9th of May, 1817, and the question was, whether Mr. Homans had a lien on the house and lot prior to that of the said deed of trust.

By the 10th section of the Act of Maryland of 1791, c. 45, "concerning the territory of Columbia and City of Washington," it is enacted, "That for all sums due and owing on written contracts, for the building any house in the said city, or the brick work, or carpenter's or joiner's work thereon, the undertaker, or workmen employed by the person for whose use the house shall be built, shall have a lien on the house and the ground on which the same is erected, as well as for the materials found by him; provided the said written contract shall have been acknowledged before one of the commissioners, a justice of the peace, or an alderman of the Corporation of Georgetown, and recorded in the office of the clerk for recording deeds herein created, within six calendar months from the time of acknowledgment, as aforesaid; and if, within two years after the last of the work is done, he proceeds in equity, he shall have remedy as upon a mortgage; or, if he proceeds at law within the same time, he may have execution against the house and land, in whose hands soever the same may be; but this remedy shall be considered as additional only, nor shall, as to the land, take place of any legal incumbrance, made prior to the commencement of such claim."

Mr. Morfit, for the plaintiff, contended that when the building contract was acknowledged and recorded, the lien related back to its date, and thus overreached the deed of trust; and *Mr. Coombe* purchased with knowledge of the lien.

Ringgold v. Lewis.

It was agreed by the parties, that if such should be the opinion of the Court, a verdict should be entered for the plaintiff; if otherwise, the plaintiff should be nonsuit.

The COURT (THRUSTON, J., absent,) was of opinion that the issue must be found for the garnishee :

1st. Because the Act of Maryland, 1791, c. 45, § 10, gives a remedy *in rem* only, and this is a proceeding *in personam*; and if the issue be found for the plaintiff, the defendant will be personally liable.

2d. Because the deed of trust under which the garnishee claims, was a legal incumbrance, made prior to the commencement of the plaintiff's claim to the lien, which commenced only at the time of the recording of the contract.

The plaintiff became nonsuit.

LYNCH v. ASHTON.

Justices of the peace have no power to bind out orphan children on a day in which the Orphans' Court is in session.

It is only where there is a contract in part executed that the Court can compel the parties to execute it in an equitable manner, under the seventh section of the Maryland Act of 1793, c. 45.

PETITION, by an apprentice, to be discharged from the indentures, because not bound by the Orphans' Court, but by two justices of the peace, on a day in which the Orphans' Court was in session; in which case this Court decided, in October last, in the case of *Thompson May v. Henry T. Bayne*, [*ante*, 335,] that the justices had no power to bind out an apprentice.

The COURT (*nem. con.*) was of opinion, in this case, that there was no contract, for want of jurisdiction in the justices of the peace, who undertook to bind out the boy.

And CRANCH, C. J., said, the boy has no power to bind himself; nor has the mother alone, or with his assent, a right to bind him out, without the authority of some tribunal. The two justices had no authority to bind him out, as the Orphans' Court was in session on that day. There was, therefore, no contract; and it is only where there is a contract in part executed, that this Court can compel the parties to execute it in an equitable manner, under the Maryland Act of 1793, c. 45, § 7.

RINGGOLD v. LEWIS.

The marshal is not entitled to poundage upon the attachment of "the money and bank-notes of the defendant, in the Office of Discount and Deposit of the Bank of

the United States, at Washington, and to his credit there ;" the money and bank-notes not having been taken into his actual custody, so as to make himself chargeable therefor.

ACTION ON THE CASE, for poundage fees, upon an attachment in favor of Lewis, against Farrow.

The attachment was issued under the Maryland Act of 1795, c. 56. The return of the marshal was in these words :—
" Attached the money and bank-notes of Nimrod Farrow, as per schedule.

" Also, attached the money and bank-notes and credits of said Farrow, in the Office of Discount and Deposit of the Bank of the United States, at Washington, and summoned Thomas Swann, president of the said Office of Discount and Deposit, as garnishee, in the presence of N. L. and E. H., May 17, 1825. Also, attached credits, May 17, 1825, in the hands of S. M. and A. C. C., two of the directors of the said branch bank, and R. S., cashier of said bank, and summoned them, as garnishees, in presence of H. T. W. and C. W. F."

The schedule referred to in the return was as follows : —

" We, the subscribers, being summoned and sworn by the marshal of the District of Columbia, in virtue and by authority of writ of attachment No. 19, appearances for the county of Washington to December term, 1825, *Joseph Lewis v. Nimrod Farrow*, to appraise and value the goods and chattels, lands and tenements of Nimrod Farrow, do value and appraise as per the following schedule :

" Schedule. The money and bank-notes of Nimrod Farrow, this day in the Office of Discount and Deposit of the Bank of the United States, at Washington, and to his credit there, amounting to ten thousand eight hundred and two dollars and thirty-five cents ; valued and appraised at \$10,802.35.

" Valued and appraised this 17th day of May, 1825.

" Witness our hands and seals." W. H. (seal.) C. W. F. (seal.) H. T. W. (seal.) J. D. (seal.)

The Maryland Act of 1799, c. 25, § 3, gives the sheriff, " For all goods and chattels which any sheriff shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on executions."

Mr. Key and *Mr. Lear*, for the plaintiff, contended that the marshal's return was conclusive upon the facts therein stated ; and that it did appear by the return that he did take the money and bank notes into his own hands, and was chargeable therewith. If they had been in a bag there could be no question ; and it does not appear that they were not.

Mr. Jones for the defendant.

 United States v. The Georgetown Bridge Company.

It must be such property as is liable to be taken in execution, and must be actually taken into the exclusive possession of the marshal, so as to make him liable therefor. If he find the property in the hands of a third person, he has no right to take it out of his possession, but must summon him as garnishee.

The return only shows that the money and bank-notes were standing to the credit of Farrow in the bank, and the president, directors, and cashier were summoned as garnishees, which shows that the money and bank-notes were not taken out of their possession, and that, consequently, the marshal was not liable therefor. They were never transferred from the credit of Farrow to that of the marshal on the books of the bank. An execution cannot be levied on money in the hands of a third person. The case of *Turner v. Fendall*, 1 Cranch, 117, is conclusive upon that point.

The COURT (MORSELL, J., *contrà*,) was of opinion that the marshal was not entitled to poundage on the bank notes, being of opinion, from his return, that if they could lawfully be taken, (of which they doubted,) they were not taken into his actual custody so as to make himself chargeable therefor; but that from the return it appears that he attached only the money and bank-notes standing to the credit of N. Farrow in the bank.



UNITED STATES v. THE GEORGETOWN BRIDGE COMPANY.

The Georgetown Bridge Company is bound to keep in repair the road leading from Georgetown to the little falls bridge, notwithstanding the Act of Congress of the 13th of July, 1813, "to incorporate a company for making a certain Turnpike-road in the county of Washington, in the District of Columbia."

PRESENTMENT against "the Georgetown Bridge Company for not keeping in repair the road leading from Georgetown to the little falls bridge."

By the Act of Maryland, 1791, c. 81, a company was incorporated, by the name of "The Georgetown Bridge Company," "to erect a bridge over the river Patowmack at or near Georgetown." This act says nothing of a road.

By the Act of Maryland of 1795, c. 44, the Georgetown Bridge Company is authorized "to open a road not exceeding sixty feet in width, from Georgetown to a bridge to be erected over the river Patowmack at or near the little falls;" and by the 2d section it is declared, "that the said road shall be a public highway forever, and kept in repair by said company."

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The road was opened accordingly, and the bridge erected. By the Act of Congress of July 13, 1813, [3 Stat. at Large, 12,] "to incorporate a company for making a certain turnpike-road in the county of Washington, in the District of Columbia," a company was incorporated by the name of "The Georgetown and Leesburgh Turnpike Company," "for the purpose of opening, graveling, and improving a road in the counties of Washington and Alexandria, in the District of Columbia, from the intersection of Falls street and Water street, in the town of Georgetown, to the boundary line of the District of Columbia, in the most direct and practicable route towards Leesburgh, conforming as nearly as shall be found advantageous and convenient, to the present main road leading from the said intersection towards Leesburgh, and through the counties of Washington and Alexandria as aforesaid."

By the 5th section, commissioners were to be appointed, who were required, upon the request of the president and directors of the company, to "cause to be surveyed, laid out and ascertained, described and marked, by certain metes and bounds, the aforesaid turnpike-road, described in the first section of this act, not less than sixty feet in breadth, in such routes, tracts, or courses for the same respectively, as, in the best of their judgment, will combine shortness of distance with the most convenient ground, and the smallest expense of money." "And the said commissioners, upon completing the said survey of the said road, shall return a plat and certificate of such survey to the said clerk" (of the Circuit Court for the county of Washington,) "and the same, being accepted by the said court, shall be recorded by the said clerk; and thereupon the said road, so laid out, shall be taken, used, and occupied as a turnpike-road and public highway forever."

By the 11th section it is enacted, "That it shall be the duty of the said corporation to keep the said road in good repair; and if, in neglect of their said duty, the said corporation shall, at any time, suffer the said road to be out of repair so as to be unsafe or inconvenient for passengers, the said corporation shall be liable to be prosecuted," &c.

The commissioners under this act surveyed and laid out a road from the bridge to the boundary line of the District, towards Leesburgh, but not from Georgetown to the bridge; and this company never made that part of the road, nor expended any money upon it.

Mr. Coxe, for the defendants, moved the Court to quash the presentment, and contended that as, by the Act of Congress incorporating the Georgetown and Leesburgh Turnpike Company, that company had a right to make the old road a turnpike, the defendants were relieved from the duty of keeping it in repair.

Mr. Swann, for the United States.

There is no inconsistency in the two acts. The new company was not bound to occupy the old road as a turnpike, and could not so occupy it unless surveyed, and the survey returned to and accepted by the Court. They could demand toll only upon that part of the road which was so surveyed. The old road was a privilege granted for the benefit of the bridge, and without which the bridge would be of no use to the public, or benefit to the proprietors.

The COURT (*nem. con.*) refused to quash the presentment.

An indictment was afterwards sent up to the grand jury, who returned it *ignoramus*.

JAMES C. WILSON and Ann his wife v. JOHN ROSE, one of the Executors of Thos. B. Beall.

If a debt by an executor to his testator be not barred by the statute of limitations at the time of the death of the testator, the executor is bound to give in the claim in the list of debts; and the statute of limitations ceases to run in favor of the debtor from the time of his accepting the trust as executor.

The right of a person interested in the administration to proceed in the Orphans' Court, according to the Maryland statute of 1798, c. 101, ch. 8, § 20, against an executor who neglects to give in a claim against himself, accrues upon the death of the testator; and from that time only, the limitation of twelve years begins to run, if it runs at all in such a case.

If an executor fails to give in a claim against himself, his administration-bond is liable to be put in suit.

THIS was a proceeding by petition in the Orphans' Court under the testamentary law of Maryland of 1798, c. 101, ch. 8, § 20, by James C. Wilson and Ann his wife, who was one of the distributees, or legatees, of the estate of Thomas B. Beall, against John Rose, one of the executors of that estate, charging him with neglecting to give in a claim against himself in the list of debts due to his testator.

The Orphans' Court, under the provisions of that section of the law, directed the following issues to be sent to this Court to be tried, namely:

"1. Whether or not the said John Rose, the defendant, was indebted to his testator, the said Thomas B. Beall, on the 30th of September, 1820, the day of the death of the said Thomas? If yea, in what sum of money?

"2. Whether or not the recovery of the said debt, if any, was not barred by the statute of limitations, as used and practised in the county (of Washington) on the said 30th September, 1820?

"3. Whether or not the recovery of the said debt, if any, was not barred by the statute of limitations, as used and practised in the said county on the 8th day of April, 1828, the day on which the said James C. Wilson &c. filed their petition against the said John Rose, in the Orphans' Court aforesaid ?

"4. Whether or not the said John Rose, as one of the executors of the said Thomas B. Beall, and having accepted the trust, and taken upon himself the burden and execution of the will of the said Thomas, was not in duty bound to give in all claims against him by the testator, in the list of debts, to the said Orphans' Court; whether or no the recovery of the said claim was barred by the statute of limitations, as used and practised in the said county on the 30th of September, 1830, the day of the death of the said Thomas; or on the 8th of April, 1828, the day on which the said James C. Wilson and wife filed their petition in the said Orphans' Court against the said John Rose? And whether the said John Rose, having failed to give in to the said court, any claim against himself by his testator, his testamentary bond has not become liable to be put in suit ?"

On the trial of the several issues, and each of them, the Orphans' Court requests the Honorable Judges of the Circuit Court of the District of Columbia for Washington county, to direct and instruct the jury, whether or not the said Thomas B. Beall, the testator, on the 30th of September, 1820, had any "just claim" against the said John Rose, his executor; and whether the said Rose, having "accepted of the said trust" of executor, and having taken upon himself the burden and execution of the said will, was not bound to give in to the said Orphans' Court, all claims against him, in the list of claims due to his testator; whether the recovery of the same was or was not barred by the statute of limitations; and whether, on the said Rose failing to give in such claim, his testamentary bond may not, under the provisions of the Act of Assembly aforesaid, be put in suit."

The debt, due by the defendant Rose to Thomas B. Beall, arose upon a covenant under seal, and accrued in 1810. The testator, Thos. B. Beall, died September 30, 1820.

The preliminary question was, whether the limitation of twelve years, in the Maryland statute, was a bar to this proceeding in the Orphans' Court, founded upon the neglect or failure of the executor, Rose, to give in the claim against himself in the list of claims due to his testator.

More than twelve years had elapsed between the time the debt became payable and the filing of the petition in the present proceeding; but twelve years had not elapsed when the testator died, and the defendant accepted the trust and office of executor.

Mr. R. P. Dunlop and *Mr. Jones*, for the petitioners, contended that it was a trust in *Mr. Rose*, and that the statute of limitations does not run against a trust. There was no person who could bring suit at law against him upon his covenant, after he became executor. The statute of limitations does not run against the claims of legatees in such a proceeding in the Orphans' Court. This is not a suit upon the covenant, nor for final distribution; it is only to decide whether the claim is to be accounted for by the executor as assets, it is only to establish the claim. It is a suit of a peculiar jurisdiction. The statute of limitations goes only to the remedy. It is the *lex fori*. It is no bar out of the jurisdiction of the *forum*. It applies only to actions at law. Courts of equity, however, have adopted it; but the Orphans' Court has not.

Mr. Marbury and *Mr. Swann*, *contrà*. The statute of limitations ought to be applied to all new remedies or forms of action. *Bank of Columbia v. Sweeny*, (2 Cranch, C. C. 704,) in this Court at the May Term, 1826, and in Sup. Ct., 2 Peters, 671. This is not a technical trust. The limitation began to run in the lifetime of the testator, and nothing can stop it. The legatees stand in the place of the testator, and the limitation continues to run against them, as it did against their testator. By the Maryland statute, the thing in action cannot be given in evidence, if it be of 12 years standing. The Orphans' Court has as good a right to adopt the statute of limitations as a court of equity has.

The COURT (*nem. con.*) was of opinion, that the statute of limitations was not a bar to this proceeding in the Orphans' Court, for the reasons stated by CRANCH, C. J., who said: The cause of this suit is the neglect of the executor to return this debt as assets. That duty accrued in 1820, upon the death of the testator. Twelve years had not elapsed from that time to the institution of this suit in the Orphans' Court.

The debt was not barred at the time of the death of the testator. It was a subsisting valid debt, which the executor was bound to return in the list of debts. His not having done so is the cause of this suit; and if the Orphans' Court, in analogy to courts of law, should admit the statute of limitations as a defence, it could be pleaded to this suit only.

The limitation ceased to run as to this debt, when it was collected and came into the hands of the executor. It then became assets. No cause of action upon the covenant then existed. The debt was satisfied.

The jury was then sworn to try the issues, and upon this verdict, this Court certified to the Orphans' Court:

That John Rose, one of the executors of Thomas B. Beall,

 Lee v. Gamble.

was indebted to him on the 30th of September, 1820, in the sum of 752.76, and that he then had a just claim against him to that amount.

That the said Rose was bound to give in to the Orphans' Court, the said claim against him in the list of debts due to his testator, and that the recovery of the said debt was not barred by the statute of limitations on the 30th of September, 1820, nor on the 8th of April, 1828, the time of filing the petition in this cause in the Orphans' Court.

And that the said John Rose, having failed to give in such claim, his testamentary bond is liable, under the provisions of the Act of Assembly aforesaid, to be put in suit.

ROBERT LEE v. WILLIAM GAMBLE.

Upon a motion to appear without special bail, the Court will not examine the merits of the case.

The debtor may avail himself of the discharge of his person under the act for the relief of insolvent debtors within the District of Columbia, against his creditor, although he has not named him in the list of his creditors filed with his petition.

A discharge of the person of the debtor from arrest, does not impair the obligation of the contract, it affects the remedy only.

DEBT upon a judgment in New York, in February, 1806, and a bond with a warrant of attorney to confess judgment dated January 27, 1806. There was a paper of the same date, signed by the plaintiff, stating that the bond was only a collateral security for a contract concerning land.

Mr. Ashton, for the defendant, moved for leave to appear without special bail; because the judgment was only a collateral security, and its validity depends upon the title to the land; because the lapse of time, (twenty-two years,) is *prima facie* evidence of payment, and because the defendant was discharged under the insolvent law of this district in 1818, long after the cause of action, if any, accrued. The Act of Congress, [3 Stat. at Large, 682,] which declares that no discharge under the said insolvent act "shall operate against any creditor residing without the District of Columbia, except the creditor at whose instance the debtor may be confined," was not passed until May 6, 1822.

By the 10th section of the original insolvent act, any debtor who shall have been discharged under that act, if arrested for any debt owing before his discharge, shall be discharged out of custody, on his common appearance being entered, without special bail. [2 Stat. at Large, 237.]

Mr. Coxe, contra. The judgment is *prima facie* evidence of

a debt, and payment must be pleaded. The Court will not decide the merits of the case upon this motion. The paper said to have been signed by the plaintiff, does not appear judicially to apply to this case.

A discharge under the insolvent act, is no discharge against a creditor not returned as such in the list of creditors annexed to the petition of the insolvent. The discharge is a judicial act, and can bind only the parties to the suit. The parties must all appear on the record. *Simms v. Slacum*, 3 Cranch, 300, 305; *Ogden v. Saunders*, 12 Wheat. 366.

No creditor, not included in the debtor's list of creditors, can file allegations against the debtor. If the fact be not admitted by the debtor, that the person is a creditor, the judge cannot hear the allegations. *Baker v. Lyde*, 7 Taunt. 179; 4 Starkie, 729. No discharge here can affect a creditor residing in one of the States, if the contract were made in that State. The plaintiff and defendant both resided in New York at the time of the judgment. *Van Ramsdyke v. Kane*, 1 Gallison, 371; *Campbell v. Claudius*, Peters, C. C. Rep. 484; *Ogden v. Saunders*, 12 Wheat. 254, 255, 259, 326, 366, 369.

CRANCH, C. J. This is not a question as to the obligation of the contract; but only as to the means of enforcing it. The obligation depends upon the *lex loci contractus*; the means of enforcing it, upon the *lex fori*.

In *Van Ramsdyke v. Kane*, 1 Gal. 376, Mr. Justice Story says, "But as to the form of action, or the remedy by which a contract is to be enforced, it seems on all sides conceded, that the recovery must be sought, and the remedy pursued, not according to the *lex loci contractus*, but according to the *lex fori*." The question in that case was as to the obligation of the contract, not as to the means of enforcing it.

In *Campbell et al. v. Claudius*, Peters, C. C. Rep. 485, the ground of the decision was, that the Courts of the United States are not bound by the State laws as to remedies, although the State courts may be; and, therefore, Mr. Justice Washington refused to discharge the defendant on common bail, the debt having been contracted beyond seas. But this Court is bound by the Act of Congress as to the remedy, and therefore that case is inapplicable to the present.

In *Ogden v. Saunders*, 12 Wheat. 259, Mr. Justice Washington says, "It" (the municipal law of the State,) "forms a part of the contract, and travels with it wherever the parties may be found." "It is so regarded by all civilized nations of the world, and is enforced by the tribunals of those nations, according to their own forms, unless the parties to it have otherwise agreed."

HYER v. SMITH.

In the same case (p. 327) Mr. Justice Trimble says, "I do not mean to say, that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts, would be manifestly a law impairing the obligation of contracts."

The COURT (THRUSTON, J. absent,) permitted the defendant to appear on common bail.

A like order was made in the case of Shephard, for the use of *Riggs v. Jacob Dixon*, argued at the same time by *Mr. Wallach*, for the defendant, and *Mr. Coxe*, for the plaintiff. Dixon's discharge also was before the Act of 1822.

HARRISON v. GALES, Special Bail of Russell.

Discharge under the insolvent law of Alabama. Exoneretur.

Mr. Bradley, moved to discharge the bail, the debtor having been discharged both by the law of Alabama, and by that of this district. Mr. Bradley produced a certified copy of the law of Alabama, and of the proceedings under it.

The plaintiff was a citizen of Alabama, and obtained judgment here against Russell, but Russell was not in confinement upon that judgment when discharged under the insolvent law of this district.

Mr. Wallach, for the defendant, contended, that by bringing suit here the plaintiff was to be considered as *pro hac vice*, residing in this district, so that the discharge operated against him, although the defendant was not in confinement at his instance at the time of the discharge; and referred to the case of *Ogden v. Saunders*, in 12 Wheaton.

Upon this point, however, the Court gave no opinion; being satisfied as to the discharge under the law of Alabama.

Bail exonerated, (THRUSTON, J. absent.)

HYER v. SMITH.

The surety for fees and costs is not liable to attachment for not paying the daily compensation to the plaintiff's witnesses.

Mr. Barrell, the plaintiff's attorney, who had become security for the plaintiff for fees and costs, was attached for not paying the plaintiff's witnesses for their daily attendance in court.

Mr. Swann and Mr. Jones, moved to discharge the attachment, on the ground that the plaintiff's attorney, who was surety for fees and costs, was not liable for the daily compensation allowed by law to the plaintiff's witnesses. See the Maryland laws, 1715, c. 48, § 12; 1716, c. 20, § 2; 1796, c. 43, § 12.

The COURT being of that opinion, (*nem. con.*) discharged the attachment.

ROBINSON v. CATHCART.

The answer of a defendant in chancery, is not evidence of new matter set up by way of defence, and not responsive to any allegation in the bill.

The representation by the plaintiff, of his opinion upon a subject respecting which the defendant is as competent to judge as the plaintiff, if honestly made, although incorrect, cannot be considered as such a misrepresentation of a material fact as should prevent a decree for the specific execution of a contract.

A voluntary settlement, however free from actual fraud, is, by the operation of the statute of 27 Eliz. c. 4, deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even where the purchase has been made with notice of the prior voluntary settlement.

In the following words in a written contract, namely: — "In further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of \$1,000," the sum of \$1,000 is a penalty, and not liquidated damages.

The parol evidence, which is to control the plain legal import and construction of a written instrument, if admissible at all, (which, perhaps, it may be, in showing cause against a decree for specific performance,) should be very clear, strong, and explicit; and not dependent on mere inferences, drawn from equivocal expressions, recollected some years after the transactions.

The decree must be according to the *allegata* as well as the *probata*. If the defendant prove a matter not alleged, which would be a good defence, the Court ought not to found its decree upon such matter, because the plaintiff is not bound to produce proof upon that point, and cannot be supposed to be prepared to answer it.

A mistake of the law is not a ground of relief in equity, where no fraud is charged.

BILL IN EQUITY, for the specific execution of a contract. (See a statement of the bill and answers in this cause, at May term, 1825, upon the motion to dissolve the injunction, 2 Cranch, C. C. 590.)

In October, 1828, at an adjournment of May term, 1828, the cause came to final hearing, upon the bill, answers, general replication, and evidence, and was heard on the 30th and 31st of October and 1st of November.

Mr. C. C. Lee, for the plaintiff. The defence consists of new facts, not responsive to the bill. The answer, therefore, is not evidence of those facts. There is no evidence of the misrepresentations relied upon in the answer.

As to the inadequacy of the price, he cited *Prebble v. Baghurst*, 1 Swanston, 329; *Costigan v. Hastler*, 2 Sch. & Lef. 166; *Emery v. Wase*, 8 Ves. 517; *Coles v. Trecothick*, 9 Ves. 246; *Burrowes v. Lock*, 10 Ves. 470.

The sum of \$1,000 was a penalty, and not liquidated damages. *Howard v. Hopkins*, 2 Atk. 371; *Chilliner v. Chilliner*, 2 Ves. 526; *Hobson v. Trevor*, 2 P. Wms. 191; S. C. 1 Str. 533; *Parks v. Wilson*, 10 Mod. 515; Nels. 295; *Anonymous*, Mos. 37; *Magrane v. Achbold*, 1 Dow. 107; *Roy v. Duke of Beaufort*, 2 Atk. 194; Pr. in Ch. 102; *Ponsonby v. Adams*, 2 Br. Parl. Cas. 431, 436; *Lowe v. Peers*, 4 Burr. 2228; *Astley v. Weldon*, 2 B. & P. 346; *Street v. Rigby*, 6 Ves. 818; 1 Fonb. 151; *Woodward v. Gyles*, 2 Vern. 119.

The clear legal construction of a written sealed instrument cannot be controlled by parol evidence.

The assignment of the Spanish fund to Mr. Woodside was voluntary, and void as to the plaintiff, who was a subsequent purchaser for a valuable consideration, without notice.

Mr. R. S. Coxe, for the defendant. As to the misrepresentations of the plaintiff, equity will not enforce a specific execution unless the agreement be "fair, certain, and just" in all its parts. *Buxton v. Sister and Cooper*, 3 Atk. 386; *Chitherall v. Ogilvie*, 1 Dessaus. 257; *O'Rourke v. Percival*, 2 Ball & B. 62; *Harnett v. Yielding*, 2 Sch. & Lef. 554. Nor in case of mistake. *Mason v. Armitage*, 13 Ves. 25; *Clifford v. Brookes*, 13 Ves. 135; *Codman v. Horner*, 18 Ves. 10; *Harnett v. Yielding*, 2 Sch. & Lef. 554; *Hughes v. Edwards*, 9 Wheat. 495.

Parol evidence may be given to show mistake, or the intention. *Wallace v. Baker*, 1 Binney, 610; *Dinkle v. Marshall*, 3 Binney, 587; *Reichart v. Castator*, 5 Binney, 109; *Drum v. Simpson*, 6 Binney, 478; *Hutchins v. Lee*, 1 Atk. 447; *Willis v. Willis*, 2 Atk. 71; *Young v. Peachy*, 2 Atk. 254; *Taylor v. Sandiford*, 7 Wheat. 17; 2 Evans's Pothier, 86, App. No. 12.

As to the question, whether the sum of \$1,000 was a penalty or liquidated damages, he cited *Chilliner v. Chilliner*, 2 Ves. 528 a; 2 Evans's Pothier, 7, 81, 93, 94; *Gray v. Crosby*, 18 Johns. 219.

Mr. Key, on the same side, cited *Osgood v. Franklin*, 2 Johns. 23; *Mortlock v. Buller*, 10 Ves. 292, 300; *Day v. Newman*, 2 Cox, Rep. 76; Sugden, 3, 4; *Lee v. Thornton and Munroe*, in this Court, June, 1809, (1 Cranch, C. C. 589); *Hunt v. Rousmanier*, 8 Wheat. 195, 211, 215.

Mr. Jones, in reply, as to inadequacy of price, cited 2 Bridgman's Digest, 23, 25, 53, 56; *Drewe v. Hanson*, 6 Ves. 675; Roberts on Frauds, preliminary chapter.

CRANCH, C. J., after stating the substance of the bill, answers, and evidence, delivered the opinion of the Court, (THRUSTON, J., *contrà*,) as follows:—

It will be perceived, by these answers, that Mr. Cathcart relies upon three grounds of defence:

1. Misrepresentation by the plaintiff during the negotiation.
2. The prior assignment of the Spanish claim, in trust for Mrs. Cathcart.

3. And an understanding expressed by Mr. Cathcart, at the time of executing the articles of agreement, and acquiesced in by the plaintiff, that he might refuse to comply with the contract on payment of the forfeiture, or penalty, of \$1,000.

All the material allegations of the bill are admitted by the answers, and the defence consists of new matter set up by the defendant, in avoidance of the plaintiff's equity. The answers, therefore, so far as they are not responsive to the bill, are not evidence of such new matter. *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 88; *Ringgold v. Ringgold*, 1 Har. & Gill, 12; *Skinner v. White*, 17 Johns. 366, 367.

Let us, then, see what evidence there is of the facts upon which the defence is founded.

1st. As to the misrepresentations. These are said to be : 1st. As to the fitness of the place called Howard for an academy; 2d. As to the boundaries of the land; 3d. As to the value of the land.

1. As to the fitness of Howard for an academy. The allegation in the answer is, that the plaintiff "represented that it was well calculated for such an establishment as the defendant then had in contemplation."

This representation, as stated in the answer, can only be understood to be a representation of an opinion, upon a subject respecting which the defendant was as competent as the plaintiff to judge. If such were honestly the plaintiff's opinion, and it should prove to be incorrect, it cannot be considered as such a misrepresentation of a material fact, as should prevent a decree for the specific execution of the contract. But there is no evidence of such a representation. Mr. Robinson, in his letter to Mr. Cathcart, of August 18, 1822, says:—"It is certainly a very pleasant place, either for a man of fortune, or for one who would wish to establish an academy, either male or female." He does not say that it is well calculated for such an establishment as the defendant then had in contemplation. The opinion is only as to the pleasantness of the place for a man who wished to establish an academy. There is no other evidence of the plaintiff's representation upon that point; and there is no evidence that it was not a pleasant place for that purpose. This first item of misrepresentation may therefore be dismissed.

2. The second is as to the boundaries of the land. The allegation of the answer is, "that the plaintiff represented to the defendant that the land which lies between the fence, near the

brick house, on the place called (Riddle's Place,) and the house on the Howard Place, belonged to and was part of the Howard Place." "That the representations so made by the plaintiff, as aforesaid, have proved utterly fallacious and deceptive." "That a part of the land, which had been shown and represented to him as constituting part of the place, for the purchase of which he was negotiating, which was inclosed within the same fence, and which most essentially added to its value and comfort, did not belong to it."

There is no evidence that the plaintiff made the representation here alleged. The only evidence which approaches to this point is the deposition of Miss Amelia H. Cathcart, who says she is "willing to declare on oath that William Robinson stated that Howard had on it a fine peach orchard, up by the fence, or near the fence, that divided Howard from Riddle's Place."

Without alluding to the circumstances under which this deposition was taken, and which were mentioned in the argument as going to its credit, it may be observed that Miss Cathcart only says she is "willing to declare on oath;" and she was only sworn to her willingness, according "to the best of her knowledge, belief, and recollection." She does not say when Mr. Robinson made that statement, nor that it was made to her father before the bargain was concluded. But her father knew better; for Mr. Robinson had informed him, by his letter to Mr. Cathcart of the 17th of August, 1822, that the orchard of fine fruit was on Riddle's Place; which, by the same letter, he offers to sell to Mr. Cathcart for \$2,000, if he can get a title to it. And Mr. Cathcart, in his letter to Mr. Robinson of the 24th of August, 1822, when he offers \$8,000 for Howard, in speaking of the forty acres called Riddle's Place, says:—"And that, if I do not purchase it, that I shall not be put to any expense in the division and fencing off the said —," meaning Howard or Riddle's Place; it is immaterial which. It shows that he knew that the fence was not on the line between the two places. And again, in his letter to Mr. R. on the 8th of February, 1823, he says that he is in no hurry for the deed, "but the plat would be of service, to indicate what part appertains to Howard;" which shows that he then knew that the fence was not on the line, and yet he did not complain of being deceived in that respect. In the same letter he also speaks of Mr. Robinson's intention to "fence in" Riddle's Place; and in no part of his correspondence with Mr. R. or Mr. Mason, before or after he had determined to resist the execution of the contract, did he complain of any misrepresentation, as to the boundaries. This

second item of misrepresentation may, therefore, also be dismissed.

3. The third is as to the value of the land. The allegation in the answer is, that the plaintiff informed the defendant, "that the Howard Place had cost him in money a very considerable sum more than \$8,000; and he had held it at \$10,000." "That the representations so made by the plaintiff, as aforesaid, have proved utterly fallacious and deceptive." "That the representations made as to the value of the farm are equally at variance with the truth."

The representation alleged was certainly made by Mr. Robinson, in his letter of the 17th of August, 1822, but it is not a representation of its value, and there is no evidence that it was false; on the contrary, it is substantially proved to be true by the depositions of Colonel Peyton and Mr. Wilbar. But if it had been an untrue representation of its value, that is no ground for refusing to decree a specific execution of the agreement; for the value of real estate is very much a matter of opinion, and depends upon imagination and so many circumstances, that very few people would agree in fixing it. This third item of misrepresentation, therefore, may also be dismissed.

2. The second ground of defence is the prior assignment of the Spanish claim, in trust for Mrs. Cathcart. The allegation in the answer is, that, in negotiating with the plaintiff, Mr. Cathcart "communicated to him, frankly and fully, the situation in which he stood as to pecuniary resources, and that his ability to pay would be wholly dependent on the amount he should receive under the treaty." "To this claim, however, this defendant had long since relinquished his right, by a conveyance thereof to Mr. John Woodside, as trustee to Jane Banker Cathcart, wife of this defendant, dated the 10th of November, 1818." That Mr. Woodside, on the 15th of January, 1824, drew a draft "in favor of Richard Smith, cashier of the Branch Bank of the United States, for \$8,550, payable out of the amount to be received under said Spanish treaty, on account of the claim aforesaid, to secure certain debts therein specified; which draft was given to and accepted by said Richard Smith, without any notice or intimation, as this defendant believes, of any prior lien; and therefore, as this defendant is advised, vested in the said Richard Smith a prior right, in law and equity, to said proceeds; the whole sum thus awarded being only \$6,900.27."

With such an avowal of a double or treble imposition, we do not know whether this Court, in the exercise of a sound discretion, ought to refuse its aid to the plaintiff, on account of the matters set up by this defendant as reasons why he should not

be compelled to perform his contract. The suppression of the truth, at the time of the contract, was an act of *mala fides* which, perhaps, ought to induce the Court to decree a specific performance, even if the assignment in favor of his wife were valid. He took upon himself the obligation to procure the assignment of that claim to be made to the plaintiff.

Whenever a defendant in equity asks to be relieved from his contract, he ought to show that the contract was made in good faith on his part, and not claim relief on the very ground of his own fraud.

But the assignment in favor of Mrs. Cathcart was voluntary, and therefore not valid against the plaintiff, who was a subsequent purchaser, for a valuable consideration, without notice.

Maddock (1 Mad. Ch. 271,) says, "Whatever previous determinations there may formerly have been to the contrary, it is now fully settled upon the statute of 27 Eliz. c. 4, which was passed to prevent frauds on purchasers, that a voluntary settlement, however free from actual fraud, is, by the operation of that statute, deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even where the purchase has been made with notice of the prior voluntary settlement. The statute receives the same construction, and produces the same effect, both in law and equity. And a purchaser of an equitable estate, for a valuable consideration, though with notice, is no more affected by a voluntary settlement than a purchaser of a legal estate. If therefore a man, after marriage, make the most prudent settlement on his wife and children, such as every wise man must approve; if the father is afterwards dishonest enough to sell, for a valuable consideration, the subject of the settlement, he may; and the sale cannot be impeached."

"I hardly know an instance," says Lord Hardwicke, "where a voluntary conveyance has not been held fraudulent against a subsequent purchaser." *White v. Sansom*, 3 Atk. 412.

And Sugden (Vendors, 434, 439,) says, "A purchaser, without notice of a voluntary settlement, may compel a performance, in specie, of the agreement, although the settlement were made *bonâ fide*." "Any conveyance executed by a husband in favor of his wife or children after marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary, and void against purchasers, by force of the act." Sugden, 434.

For this reason, as well as because a defendant cannot avail himself of his own fraud, this second ground of defence must fail.

3. The third ground of defence is a supposed understanding expressed by Mr. Cathcart at the time of executing the articles

of agreement, and acquiesced in by the plaintiff, that the defendant might refuse to comply with the contract, on payment of the forfeiture or penalty of \$1000.

Upon this point the allegation of the answer is, "That the sum of \$1000 was inserted by the defendant, in said article of agreement, with the full belief, on his part, that he might either take the property at the stipulated price, or pay the said sum, at his option; and that the agreement was executed by said complainant with full knowledge that such was the belief and understanding of this defendant." That the said sum of \$1000, in the said articles of agreement mentioned, was inserted therein upon his, the defendant's, suggestion, and with the express understanding and intention that he might, at any time before the execution and delivery and acceptance of the several instruments by the parties respectively to be executed, give up said contract, on the payment of \$1000." "That if the complainant has any remedy against the defendant, it is for said penalty alone; and that subject to all legal and equitable offsets; and that such remedy, if any exists, is to be had in a court of law;" and "can extend no further than the sum of \$1000, which was agreed upon and understood to be inserted therein, as the forfeiture which either party might incur by a non-compliance," and that "this amount must be subject to all legal and equitable deductions."

The first question, arising upon this allegation, is whether it be sufficiently proved.

The only evidence in support of it is that which is derived from the depositions of Mr. Cathcart's family. Some doubt is thrown upon the credit of those depositions by the circumstances and manner in which they were taken. They appear to have been drawn up in the family, *ex parte*, and upon leading interrogatories; and in this form to have been brought to the magistrate; before whom the deponents made oath that their answers were true, "to the best of their knowledge, belief, and recollection." Some of them, particularly Mr. Hutton's, which is the most important of them, had been before sworn to, as a voluntary affidavit. Under these circumstances the counsel for the plaintiff declined a cross-examination, as deeming them not worthy of credit.

One of these deponents, Mr. Hutton, the son-in-law of Mr. Cathcart, and residing in his house, testified, on the 12th of May, 1827, "to the best of his recollection, knowledge, and belief," that he was certainly quite ready to "swear or affirm" to the truth of the declaration he had before made on the 16th and sworn to on the 17th of July, 1824, before Mr. Moulder, which was since the filing of this bill.

In this declaration he states that on or about the 10th of September, 1822, he was present at the house of Mr. Cathcart, in Washington, when the terms of the purchase of the farm called Howard were discussed by Mr. Cathcart and Mr. Robinson, and finally settled and concluded. That Mr. Robinson, having made a loose draft of the terms in writing, "the said Cathcart thereupon proceeded to draw up, in a more formal manner, articles of agreement; and having proceeded to some length therein, was interrupted by a remark that was made by one of the parties, (I do not distinctly recollect which,) relating to the propriety of providing for a pecuniary forfeiture, in the event of the non-performance of the stipulations of the agreement, by either of the parties, the said Cathcart referred to the said Robinson to say how much the penalty should be; to which the said Robinson replied, 'he did not care how much; it made no difference to him,' or words to that meaning, and added \$20,000. To this the said Cathcart decidedly and promptly objected, and refused to accede, declaring it to be decidedly too much; and assigned, as the reasons of his objections, that he had passed a large part of his life in the public service; was then endeavoring to, and had expectations of being again employed, in which case it might become more to his advantage to give up the place. That the expected employments might be such as indeed to justify and enable him to pay a smaller penalty, if he found it necessary or expedient to violate the agreement, though they should not be such as to enable him to pay a larger one. He then stipulated one thousand dollars as the amount of the penalty, to which the said Robinson acceded, under (as it clearly appeared to me,) a full understanding of the privilege of relinquishment reserved by the said Cathcart, on the payment of the penalty of 1000 dollars as aforesaid; which said sum of 1000 dollars was inserted as the amount of the penalty in the articles of agreement which were then and there as before declared, made out in duplicates, and signed by the said Cathcart and Robinson."

If the whole of Mr. Hutton's declaration should be admitted to be true, does it prove any thing more than that Mr. Cathcart objected to subject himself to the payment of damages, for the breach of the contract, to a greater amount than 1000 dollars? It would probably be so understood by every man of business; and it is natural to suppose that Mr. Robinson so understood it. The written contract is clear and unequivocal. Instead of saying that either party should be permitted to rescind the contract upon payment of 1000 dollars, or that 1000 dollars should be the liquidated damages, upon payment of which either party

might retract the bargain; it says, expressly, that "in further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of 1000 dollars."

Nothing can be more certain than that, upon the face of this written instrument, the sum of 1000 dollars is a penalty, and not liquidated damages.

The parol evidence which is to control the plain legal import and construction of a written instrument, if admissible at all, (which perhaps it may be, in showing cause against a decree for specific performance, 1 Mad. Ch. 405, 406, 408,) should be very clear, strong, and explicit; and not dependent on mere inferences drawn from equivocal expressions recollected some years after the transaction. If Mr. Robinson did not clearly understand Mr. Cathcart as claiming a right to rescind the bargain upon payment of the penalty, there was no agreement to that effect.

The allegation in the answer, as we understand it, is, that such was the understanding and agreement of the parties.

The decree of this Court must be according to the *allegata*, as well as the *probata*; and if a sufficient defence could be made out in proof, yet if it be not in the allegations it will not avail the defendant. Nothing is put in issue which is not alleged in the bill or answer; and neither party is bound to produce evidence in relation to matters not in issue.

If the defendant prove a matter not alleged, which would be a good defence, the Court ought not to found its decree on such matter; because the plaintiff is not bound to produce proof upon that point, and cannot be supposed to be prepared to answer it. Cooper's Equity, 328, 329, 333, 334, 335, 339, 340; 2 Mad Ch. 368, 373, 374, 375, 378; *Jones v. Jones*, 3 Atk. 111; *Goodwin v. Goodwin*, 3 Atk. 370.

The same observation may apply to the inadequacy of price, which was much argued at the bar.

Upon this point, however, we will cite the words of the Court of Appeals of Virginia, in the case of *Ward v. Webber*, 1 Wash. 274. "A court of equity will never decree iniquity; and there are instances where they have refused to decree hard bargains, though fair; but these are rare, and are generally cases of glaring hardship; for, in general, the court will not undertake to estimate the speculations of parties in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations." See also *Adams v. Weare*, 1 Bro. C. C. 569; 1 Mad. Ch. 408.

To return, however, to the declaration of Mr. Hutton, he says, that when Mr. Robinson was asked what should be the amount

of the penalty, he said, "he did not care how much; it made no difference to him." Can it be supposed that Mr. Robinson, who has been represented as a shrewd man, and careful of his interest, should be perfectly indifferent as to the amount of the sum, upon the payment of which either party might rescind the contract? especially as, according to the representation of the defendant, he had made a good bargain, and got more for his property than it was worth? Was it indifferent to him whether the defendant assigned to him the Spanish claim? whether he insured the house? or whether he paid the purchase-money after having had possession of the property? And yet he must have been so if it were indifferent to him what even Mr. Cathcart should pay for liberty to rescind the bargain. It is clear, then, that Mr. Robinson did not understand Mr. Cathcart as insisting upon the right to rescind the bargain on payment of the \$1000; or that if he did so understand him, he never assented to, or acquiesced in that understanding, so as to form an agreement. If that had been the understanding of either party, he would have limited a time for repentance, a *locus penitentiæ*. How long was the right to rescind to continue? Mr. Cathcart says, till the execution, delivery, and acceptance of the several instruments which were to be executed. But Mr. Hutton says nothing of this. According to his account of the transaction, no time was limited. The natural inference would be that the parties took time to consider; and that, during that time, things were to remain unchanged; and if either party did any act affirming the bargain, he thereby made his election, and waived his right to rescind. But we think there is no evidence of any such agreement. The bargain was effectually made before the articles were written, on the 10th of September. Mr. Cathcart, in his letter of the 24th of August, 1822, offered the terms, which were accepted by Mr. Robinson; and in that letter he does not reserve any *locus penitentiæ*; nor say any thing of stipulated damages; or of a sum to be forfeited. And, in his letter of the 4th of September, 1822, he tells Mr. Robinson, that if he agrees to the terms offered, he may consider the business settled. Mr. Robinson did agree to the terms; and on the 9th of September, gave Mr. Cathcart a letter to Mr. Wilbar, authorizing him to deliver the possession. In the original agreement there was no reservation of a right to rescind. According to Mr. Hutton, the idea of a penalty was first started after the bargain had been made, and the articles of agreement were almost finished. It was a sudden thought; and a matter which Mr. Robinson deemed wholly unimportant. From the 10th of September to the 8th of February, Mr. Cathcart was anxious to execute the

instruments, and called two or three times on Mr. Jones, who was to prepare them. On the 1st of October, 1822, he took possession of the property; and during all this time not a word was said between the parties respecting the right to rescind.

Upon the whole, it seems clear to us, that no right to rescind was reserved by either party.

If the answer can be supposed to insist on the simple mistake of the legal import of the written agreement, it was a mistake of the law; but this is not a ground of relief in equity where no fraud is charged. *Lord Irnham v. Child*, 1 Bro. C. C. 91, and *Howard v. Hopkins*, 2 Atk. 371.

In this last-mentioned case of *Howard v. Hopkins*, there was a proviso in the agreement, "that if either side should break the agreement, he should pay £100 to the other."

The defendant contended that it was the intention of the plaintiff and defendant, that, upon either paying the £100, the agreement should be absolutely void." But the Lord Chancellor said, "as to the defence of the stipulated sum, I cannot take this to let off either party when they please; but it is no more than the common case of a penalty; for it might be inserted by the plaintiff in order to be paid for his trouble in viewing and measuring the estate, taking plans, &c. supposing the defendant should not be able to make out a title." "In all cases where penalties are inserted in case of non-performance, this has never been held to release parties from their agreement, but they must perform it notwithstanding." See also *Hopson v. Trevor*, 1 Str. 533; S. C. 2 P. Wms. 191; *Park v. Wilson*, 10 Mod. 515; *Lennon v. Napper*, 2 Sch. & Lef. 684; *Margrave v. Archbold*, 1 Dow, 107; *Telfaire v. Telfaire*, 2 Dess. Rep. 271; Sugden, Vendors, 163, 2d Amer. ed. Phila. 1820.

Fonblanque, (vol. 1, p. 108,) says, "As to ignorance of law, it may be laid down as a general proposition, that it shall not affect agreements, nor excuse from the consequences of particular acts, even in courts of equity."

Eden (on Injunctions, p. 10,) says, "There are numerous cases in which the court has refused to interfere where an instrument has been executed, or a sum of money paid, under an erroneous notion of the law." *Mildmay v. Hungerford*, 2 Vern. 243; *Harman v. Camm*, 4 Vin. Ab. 387; *Willey v. Cooper's Company*, 3 P. Wms. 127, (n.); *Atwood v. Lamprey*, ib.; *Lord Irnham v. Child*, 1 Br. C. C. 92; *Langstaffe v. Fenwick*, 10 Ves. 406; *Currie v. Goold*, 2 Mad. Rep. 163.

"We may now, therefore, consider the maxim, *ignorantia juris non excusat*, as fully recognized in equity, as it has been unquestionably established in civil cases at law. Dig. 22, tit. 6; Cod.

1, 18 ; *De juris et facti ignorantia* ; Code Napoleon, 2052, 3, 8." See also Lutwyche, 1569, Powell's opinion in *Gwinn v. Poole*.

If, therefore, the question of mistake of the legal import of the written agreement be in issue, it cannot avail the defendant if proved. But we do not think it is proved. If there were any mistake, it seems only as to the jurisdiction of a court of equity to enforce a specific performance of a contract, notwithstanding the insertion of a penalty.

Both parties and the witness, Mr. Hutton, at the time of the execution of the written agreement, understood it to be a penalty ; and the defendant in his answer, is cautious not to admit that he is liable for the whole amount, but avers that it is subject to all legal and equitable off-sets and deductions ; which we understand to amount to an admission that it was a mere penalty to cover damages at law. Such a mistake, or ignorance of the extent of the jurisdiction of a court of equity, is an instance of that *ignorantia juris* which Fonblanque says is no excuse, even in courts of equity.

Liquidated damages must be in lieu of the contract. *Gray v. Crosby*, 18 Johns. 219 ; but this penalty is expressly declared, in the written contract, to be "in further confirmation of the agreement."

That this is a penalty, according to the legal construction of the writing, is too plain to need the support of the numerous authorities which have been cited.

The smallness of the penalty has been urged as an argument in support of the idea that it was intended as liquidated damages, and not a mere penalty. But to our minds it affords evidence of the contrary proposition. It was inadequate indemnity to either party for the non-performance of the contract. For if Mr. Cathcart, who had obtained possession, had been successful in establishing his academy to the extent of his expectations, and had made great improvements, which might have been the case ; before all the instruments should have been executed, he would probably have thought the sum of \$1000 very inadequate compensation to him for his losses, if Mr. Robinson should have rescinded the bargain, and broken up the establishment, or if Mr. Cathcart should have been evicted by one having a better title. On the other hand, Mr. Robinson would have found that sum wholly insufficient to remunerate him for his loss, if Mr. Cathcart should have failed to insure the buildings, (which constituted a very large part of the value of the property,) and they should have been consumed by fire. It is most natural, therefore, to suppose that the penalty was inserted to limit the responsibility of the parties for damages at law ; leaving to each

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his remedy in equity to enforce the specific performance of the contract. We think, therefore, that no argument can be drawn, in favor of the defendant, from the smallness of the penalty.

If the questions of inadequacy of price, and healthiness of the place, are put in issue, they are not supported by the evidence.

The questions respecting the meadow, the springs, the rent due by Wilbar, and his agreement to do certain things upon the land, are certainly not in issue, and are wholly immaterial.

Upon the whole, we are of opinion that the defendant has not made out such a defence as will justify this Court in refusing to decree a specific performance of the contract.

The decree in substance was, that the Spanish fund should be paid over to the plaintiff, in part payment of the purchase-money and interest from January, 1825; that the defendant should pay the balance by the 1st October, 1829, upon payment of which he should be entitled to the deed filed in the cause, and which had been offered to him in June, 1823, and in default of payment of the balance, that the place, called Howard, should be sold to raise the money.

This decree was reversed in part, upon appeal to the Supreme Court. See 5 Peters, 264.



JNO. BOONE'S EXECUTOR v. WALTER CLARKE AND WIFE, AND THOMAS SCOTT AND WIFE, the Personal Representatives of Francis Boone.

If there be two joint trustees with a joint power of attorney to sell, the trust cannot be executed by one alone, either in the lifetime of the other, or after his death.

A power of attorney becomes invalid by the death of the principal, except so far as the attorney has an interest coupled with the power.

Upon the death of one of two joint trustees, the trust does not survive to the other, unless such a provision be inserted in the deed of trust.

BILL IN EQUITY by the executor of a creditor of Francis Boone, against Walter Clarke and wife, and Thomas Scott and wife, the personal representatives of the said Francis Boone, deceased.

The material facts of the case, as they appear in the record, are,

That Francis Boone, the owner of certain slaves, by deed dated March 21, 1801, conveyed them, and other personal property, to Robert Bowie and Alexius Boone jointly in trust to pay certain debts due by Francis Boone to those two trustees and others, and to pay over the surplus to himself, with a joint power to the two trustees to sell the property at public or private

sale, either in their own names, or in the name of the grantor, Francis Boone. The deed was duly acknowledged and recorded, but the property remained in the possession of the grantor, until his death in November, 1815.

On the 16th of April, 1814, the same Francis Boone, by deed of that date duly acknowledged and recorded, conveyed the same slaves to the plaintiff's testator, John Boone, to secure a debt of \$385.70, due by Francis to John, with power to John to sell the same in execution of the trust, but the possession still remained in Francis, who at his death was possessed of property more than sufficient to pay all his debts.

That the debts secured by the first deed were paid off in the lifetime of Francis Boone; but not the debt due to the plaintiff's testator.

Francis Boone was the father-in-law of the defendant, Walter Clarke, and lived and died in his family.

After the death of Francis Boone, Robert Bowie, one of the trustees, the other trustee having "relinquished," sold to the defendant, Walter Clarke, for the consideration of \$1,000, on the 24th of June, 1816, "all his right, title, and interest," in the slaves in question, without notice of the deed of Francis Boone to John Boone.

This suit was brought to set aside that deed of Robert Bowie to Walter Clarke, and to obtain a decree for the sale of the slaves under the deed from Francis Boone to John Boone.

The cause was argued by *Mr. Key* and *Mr. J. Dunlop*, for the plaintiff; and by *Mr. C. C. Lee* and *Mr. Jones*, for the defendant.

CRANCH, C. J., after stating the case, delivered the following opinion, in which the other judges concurred.

From the circumstances thus appearing in evidence in this cause, a strong presumption arises that the debts mentioned in the deed of 1801 were fully paid off before the death of Francis Boone, and that Mr. Bowie had no authority, as trustee, to sell the property.

The power of attorney contained in the deed became invalid by the death of F. Boone, except so far as the interest of the trustees was coupled with the power; and if their interest had been extinguished, the power did not survive. It does not appear that Alexius Boone, the co-trustee, was dead at the date of the deed from Mr. Bowie to Mr. Clarke. The trust was joint, and could not be executed by one. There was no provision in the deed that the trust should survive. Upon the death of one, the trust failed. After all the debts were paid, the trustees had only a power to transfer the legal estate to F. Boone, or his legal representatives, that is, his executors or

administrators. One trustee alone could do no valid act. He could not divest himself of any part of the legal estate, nor transfer the personal trust. The trust was not only personal, but jointly personal. Neither could act without the other.

I am of opinion, therefore, that the bill of sale from Robert Bowie to Walter Clarke was absolutely void; and the presumption being strong that the debts secured by the deed of 1801 were paid off in the lifetime of Francis Boone, I think the plaintiff has a right, under the deed of 1814, to pursue the property in the hands of the defendants.

Afterwards, at the same term, on the 2d of April, 1829, *Mr. C. C. Lee*, for the defendant, moved for a rehearing, and the Court agreed to receive any further notes of argument on the part of the defendant.

Mr. Lee submitted his notes, which were filed with the papers in the cause; *Mr. Jones* did not send any notes.

On the 30th of July, 1829, CRANCH, C. J., said, —

Upon reconsidering this case, and *Mr. Lee's* notes, I am still of the same opinion as before. The defendant Clarke acquired no title whatever from Bowie, and is, therefore, not such a purchaser for valuable consideration, without notice, as can be protected by that principle. The plaintiff is only pursuing the property in the hands of the defendant, who can claim nothing but a naked possession against a mortgagee for a valuable consideration. And of that opinion was the Court.

ROSS'S EXECUTORS v. HOLTZMAN.

The personal estate of the testator is not liable for taxes accruing upon his real estate in Georgetown, D. C., after his death; but is liable for the taxes upon his personal estate.

A distress is not a judicial process.

One distress may be made for taxes due to the corporation and to the county, if made by the same collector.

A distress is the private remedy of the party entitled to the rent, toll, service, tax, or other duty, for which the tenant or debtor is liable.

When the party who has made the distress comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the Court.

REPLEVIN. Case stated. The plaintiffs' testator died in January, 1822. His executors sold his personal estate after this distress, that is, after May 30, 1827. The taxes, for which the distress was levied, became due to the Corporation of Georgetown upon his real estate, for the years 1821, 1822, 1825, and

1826; and to the Levy Court, for the county tax for 1826. The plaintiffs paid the tax for 1821, at the time of taking out the replevin. The negro distrained was part of the personal estate of the testator, found upon the premises, that is, in the dwelling-house on Bridge Street, in which the testator lived and died; which house, with the personal property therein, had, from the death of the testator to the time of levying the distress, been in the use and occupation of S. J. Potts, one of the plaintiffs, who married one of the heirs of the testator, and who was appointed guardian of the infant heirs, and with whom all the children of the testator, except three, lived from his death till May 12, 1827, when the premises were taken possession of by the Bank of the United States, and sold. During all which period Mr. Potts received the rents and profits of the estate. The whole of the real estate had been conveyed by the testator, in his lifetime, in trust, to secure a very large debt due to the Bank of the United States.

If, upon these facts, the Court should be of opinion that the property distrained was liable for the said taxes, or any thereof, with expenses, &c., judgment to be for the defendant; otherwise, for the plaintiffs.

The cause was argued by *Mr. Marbury* and *Mr. Coxe*, for the plaintiffs; and by *Mr. Dunlop* and *Mr. Key*, for the defendant.

CRANCH, C. J., after stating the case, delivered the opinion of the Court (*nem. con.*) as follows:—

The taxes, which accrued in the lifetime of the testator, having been paid since the distress, the principal question is, whether the personal assets of the testator, found upon the premises, is liable to distress for taxes on the real estate, which became due to the Corporation of Georgetown, or to the Levy Court, after the death of the testator.

By the Act of Congress of the 26th of May, 1824, § 8, [4 Stat. at Large, 75,] it is enacted "that it shall be lawful to collect said taxes," (that is, corporation taxes of Georgetown,) "by distress and sale thereof," (that is, of the personal estate of the "owner or tenant" of the real estate.) This applies only to taxes thereafter to fall due, as appears by the expressions "in all cases hereafter," in section 7, and "hereafter to fall due," in section 10. But the 10th section impliedly gives the same remedy, "where any taxes have fallen due and yet remain unpaid;" for it authorizes the Corporation of Georgetown "to collect said taxes by sale of the real estate liable, agreeably to the provisions of this act, in relation to other cases of collecting taxes hereafter to fall due;" that is, to sell the real estate, when

the owner or tenant has not sufficient personal estate out of which payment may be enforced.

This is the only law produced to the Court, by which the taxes can be collected by distress and sale of personal property.

The question then is, whether negro Lewis was the personal property of the owner or tenant of the real property, on account of which the tax became due.

This negro did not belong to the Bank of the United States, but was assets in the hands of the executors of A. Ross, liable to the payment of his debts. The taxes were not a debt due from him, for which those executors, or those assets, were liable. The executors, as such, were not owners of the real estate, nor had they any right to apply the personal assets to the payment of taxes upon the real estate, accruing after the death of their testator. Those assets were to be applied by them, in the course of their administration, to the payment of the debts of their testator, or his legacies, or to those who might be entitled to the surplus, in the course of distribution, if not disposed of by the will.

The testator directed that, for payment of his debts, a certain part of his real estate should be sold, at such time and place as his executors should deem most proper and fit; but does not say by whom the estate should be sold. He then directs that if that part of his real estate should not be sufficient to pay his debts, the residue should be paid out of the personal estate. As to the residue of his real estate, he directs that it should be held for ten years by his children and nieces in equal proportions; and that, at the expiration of that period, it should be sold and divided among his children. The executors, as such, had no interest in the real estate; at most, they had a naked power to sell, as trustees. The fee descended to the heirs at law, but the personal estate vested in the executors.

The negro Lewis, therefore, was not the property of the owner of the real estate, nor was he the property of the tenant. That tenant, indeed, was one of the executors; but, as tenant, he did not own the slave. He claimed him in another right; not as his property, but as the property of the executors, to be applied to the payment of the debts of the testator.

As the property distrained was not the property of the owner of the land, the judgment, on the case stated, must be for the plaintiff.

No law is shown which authorized the collector of the county tax to seize the personal property of any person, but him who was debtor for the tax.

CRANCH, C. J. After the opinion of the Court was given upon

the principal point, it was suggested that a part of the taxes, for which the distress was levied, was a corporation tax of \$10.24, upon personal property of the estate of the testator, A. Ross, in the hands of the executors, for the year 1822; and a county tax on the same personal property, of \$1.80, for the year 1826; that there can be no objection to the distress for these taxes upon the personal property; and that, by the case agreed, if the distress was valid for any part, judgment is to be entered for the defendant, for the amount of the tax for which he had a right to distrain.

No objection has been made to the distress for the taxes upon the personal estate, but this: That the defendant, being collector for both county and corporation taxes, made one undivided distress for the taxes due in both rights. A distress is not a judicial process. It is the private remedy of the party entitled to the rent, toll, service, tax, or other duty, for which the tenant or the debtor is liable. When the party who has made the distress comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the Court.

This is an objection to the form rather than to the merits of the case, and I presume was not contemplated when the case was agreed for the consideration of the Court, as it does not appear in that statement.

The Court being of opinion that the defendant had a right to distrain the replevied property for the amount of the taxes due upon the personal estate, the judgment must be for the defendant, for that amount.

The other judges concurred.

REBECCA BLODGET v. ROBERT Y. BRENT.

A widow cannot be barred of her dower by a tax sale, either under the Act of Congress laying a direct tax, or for the county taxes; nor by a sale under a decree in the lifetime of the husband.

A purchaser at a sale for taxes acquires only the right of the person in whose name the property was assessed.

A widow, before actual assignment of her dower, has no estate in the land. It is an incumbrance upon the land, into whose hands soever it may pass; but she is not seized, and has no right to enter, or to pay the taxes, or to redeem the land when sold for taxes.

The tenant, until assignment of dower, is bound to pay the taxes.

WRIT OF DOWER in forty-two acres of land.

By the case stated, it appears that the marriage, the seizin in fee by Samuel Blodget, the husband, during the coverture, and his death in 1814, were admitted.

On the 14th of October, 1816, the defendant purchased the premises at a sale made under a decree of this Court against the husband in his lifetime, (namely, in 1813.)

On the 28th of February, 1817, the defendant purchased the same premises again, at a sale by a collector of the United States direct tax due for the year 1815.

On the 21st of November, 1818, the defendant received a deed from the trustee under the decree of this Court.

On the 31st of July, 1822, the defendant purchased the premises again, at a sale by a collector of the county taxes due for the years 1812 to 1819, and received a deed from him on the 25th of September, 1822.

On the 23d of May, 1827, the defendant received a deed from the collector of the United States tax.

These sales are all admitted to have been correctly made ; and the question is, whether they are a bar to the plaintiff's right of dower.

Mr. Hall, for the plaintiff, rested her case upon the admission of the marriage, seizin in fee of the husband during the coverture, and his death in 1814.

Mr. Worthington, for the defendant, contended that the plaintiff's right vested before the tax sale, and by that sale passed to the defendant. The land itself was sold. It was her own neglect in not paying the taxes and obtaining an assignment of dower by the tenant, who was not bound to pay the taxes upon her third part of the land. The taxes were an annual incumbrance ; she ought to have paid her part. *Mr. W.* referred to the Maryland law of 1797, c. 90, § 4, respecting the sale of lands for county taxes, and the proceedings therein.

Mr. Coxe, in reply. The wife has no estate in the land until her dower is assigned. Her right, on the death of her husband, was only a right to have dower assigned. It was not her laches ; she cannot assign her own dower ; she cannot enter on the land ; it is the laches of the heir or assignee. The whole freehold descends upon the heir. Cruise, c. 4, § 1 ; *Id.* p. 120.

CRANCH, C. J., after stating the case, delivered the opinion of the Court (*nem. con.*)

These sales are all admitted to have been correctly made ; and the question is whether they are a bar to the plaintiff's right of dower.

In both the tax sales the property was advertised as the property of Samuel Blodget's heirs, and sold as such.

The sale made to the defendant by the trustee, on the 14th of October, 1816, was not ratified by the Court until June 3d, 1818.

The Act of Congress of the 27th of February, 1815, ch. 60, [3 Stat. at Large, 216,] laying a direct tax on the District of Columbia, requires that the tax should be assessed, laid, and collected in the manner described in the Act of the 9th of January, 1815, ch. 21, the 24th section of which declares that the annual amount of the taxes "shall be and remain a lien upon all lands and other real estate, and all slaves of the individuals who may be assessed for the same, during two years after the time it shall annually become due and payable; and the said lien shall extend to each and every part of all tracts or lots of land, or dwelling-houses, notwithstanding the same may have been divided or alienated in part;" and by the 27th and 28th sections, the lands may be sold if the tax be not paid in one year after notification.

The sale for the county tax was made under the Act of Congress of March 3, 1801, § 4, [2 Stat at Large, 115,] which gives the Levy Court the same power and means to collect taxes which, by the laws of Maryland then in force, were given to the levy courts, or county commissioners, in Maryland. By the Maryland law of 1797, c. 90, so much of the lands charged for the payment of county taxes may be sold by the collector as may be sufficient to discharge the taxes due thereon, if he can find no personal property in the county liable for the same.

Neither the Act of Congress nor the Act of Maryland says that the purchaser shall hold the property free from all incumbrance. He would acquire, one would think, nothing more than the right of the United States and of their debtor. The Act of Congress says that the tax shall be a lien on the lands of the individual who may be assessed for the same; and no land is liable to be sold but the land upon which the tax is a lien. The land of A. cannot be sold if assessed to B. If it be sold as B.'s land, nothing but B.'s title passes.

So in Maryland, the land cannot be sold if personal property of the person, in whose name the land is assessed, can be found in the county. If no such personal property be found, then the land is sold as the land of the person in whose name it is assessed; and nothing but his title passes by the sale.

But the case of a widow whose dower has never been assigned is still stronger. No act of the husband or of his heirs could deprive her of her right; yet she has no estate in the land until actual assignment of her dower. *Jackson v. Vanderheyden*, 17 Johns. 167. It is an incumbrance upon the land into whose hands soever it may pass, but she is not seized, and has no right to enter. If land be sold under a decree in chancery in a case in which the widow is not a party, or under a judgment against

the husband, the purchaser takes it with its incumbrance. It would, otherwise, be in the power of the husband or his heirs to deprive the widow of her dower by suffering a judgment, or a sale for taxes, to take effect. *Caveat emptor* is the rule in both cases. Before assignment of dower, the widow has no right to pay the taxes, or to redeem. She looks to the tenant of the freehold, whoever he may be, and he is bound to pay the taxes until he assigns her dower. The defendant, in the present case, purchased the property under the decree of this Court, subject to the plaintiff's right of dower. He was bound to pay the tax. He can gain no new or better title, as against the plaintiff, by suffering the land to be sold for taxes, and buying it himself.

MANDEVILLE *et al.* v. COOKENDORFER.

For negligence of an agent, his principal only is liable.

It is negligence in a stage-office keeper to suffer a slave to go off in the coach by means of a false certificate of freedom; and the stage owners only are liable for the damages.

ACTION ON THE CASE, for negligence of a stage-office keeper, in suffering the plaintiff's slave to escape, by permitting him to go in the stage coach to Baltimore under a false pass.

This cause having been tried upon the new *venire* issued by order of the Court at December term, 1827, the jury found a verdict for the plaintiffs, with \$200 damages, subject to the opinion of the Court, whether the action would lie against the office-keeper, the agent of the owners of the coach.

The case was argued by *Mr. Swann*, for the plaintiffs, and *Mr. Key*, for the defendant.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., dissenting.)

The declaration consists of two counts.

The first count charges that the plaintiffs were owners of the slave Richard Bunbury; that the defendant was "the keeper and superintendent, and had the management and control of a stage-office for the entry of lawful passengers travelling from the city of Washington to Baltimore," "and had the management, superintendence, and direction of that part of said line of stages which leaves Washington city for and on the route to said Baltimore; and the said Cookendorfer, not regarding his duty in that behalf, took so little and such bad care of, and conducted himself so negligently, carelessly, improperly, and unlawfully, in the management of the said line, or part of line, of stages, and

the office for such stages, line, or part of line of stages, in the said county, that the said "slave, the property of the plaintiffs, "was by and through the carelessness, misdirection, mismanagement, negligence, and unlawful conduct of said defendant, permitted, suffered, and allowed, and by him unlawfully, carelessly, and negligently authorized and enabled to take a seat and passage in the said line of stages, or one of the stages of the said line," "and to be therein and thereby carried and taken out of and beyond the county and District of Columbia aforesaid, and out of and from the control of the said plaintiffs, and thereby caused" them to expend a large sum of money in recovering him, and to lose his services for eighteen months, &c.

The second count charges that the defendant was "the keeper of the stage-office for the line of stages which runs to and between and on the route to and between the city of Baltimore in the State of Maryland, from the city of Washington in the said county of Washington," "and had the control and management of the same, and the superintendence of all passages taken and entered on the books and way-bill for and in the said line and route of stages for said city of Washington; and it was then and there his duty as such superintendent, not to furnish or suffer, or in anywise aid any slave for life to make and effect his escape from the ownership, control of, or servitude to his lawful master or masters, by means of, or through the said stage-line, or stage-office, or by, or in any manner or mode of conveyance under or within his control, as superintendent of such line of stages or stage, belonging or connected to or with the said line or route or office. Nevertheless, the said Thomas Cookendorfer, not regarding his duty aforesaid, wrongfully, negligently, carelessly, and unlawfully, did, on the 28th of September, in the year 1825, at" &c. "without the consent of the plaintiffs, or either of them, suffer, allow, and give permission to and aid the said negro, and carelessly, negligently, and unlawfully permitted and aided him, the said negro R. B., the property of said plaintiffs, to take passage and conveyance in the said line or route of stages, or one of the stages of the said line or route from Washington city to, and on the route to Baltimore," "and to be therein conveyed and carried out of the county and district aforesaid, and out of the reach and control of the said plaintiffs," whereby they lost his services, &c. and were forced to expend a large sum of money in recovering him, &c.

The case stated is, that the said slave eloped from the plaintiff's service in Alexandria and went to Washington City, and there called himself Seymore Cunningham; and showed a certificate from a notary-public, which had been granted to Seymore

Cunningham, stating that he, the said S. C., was a free man of color; and that the said slave, Richard Bunbury, stated that he was, in fact, the said Seymore Cunningham.

Evidence was offered to prove that "the person described in the said certificate did not correspond with the person of the said R. B.; that he was taller than the person described in the certificate, and was a very bright mulatto, whereas Cunningham, the person described in the certificate, was a dark mulatto," and "that the least attention on the part of the defendant would have detected the difference, as the witnesses thought."

That the slave went to the stage-office in Washington city, which office was of the line of stages mentioned in the declaration, kept and managed by the defendant, and represented himself to the defendant as Seymore Cunningham, and showed his said certificate of freedom; and the defendant thereupon permitted him to take his seat in the book of the said stage-office, kept and managed as aforesaid by the defendant, and permitted him to take passage in the stage of the said stage-line mentioned in the declaration, and the said slave went off in the said stage to Baltimore, and from thence to Boston.

That the instructions given by the stage-line owners to the clerks in the said stage-office, and the practice and usage in relation to allowing seats to be taken in the stages of the said line, by colored persons, were these:—"That the clerks were to allow free persons of color to take seats, and not slaves, except with their owner's permission; and that, in order to determine whether the persons of color, offering to take seats, were free or slaves, the said clerks were required to demand that they should produce certificates of freedom; and upon so producing such certificates, purporting to prove the freedom of the persons presenting themselves, they were to permit such persons to take seats as free persons, and were not required to ascertain in any other way than by production of such certificates, whether the said colored persons were free or slaves."

The declaration charges the defendant, as keeper and superintendent of a stage-office. These expressions imply an agency, not an ownership; and the case stated admits that there were owners of the stage-line, other than the keeper of the office. The defendant, therefore, is to be considered as the agent of the owners of the stage-line; and the question arises whether the defendant, who, it appears by the statement of facts, obeyed the instructions of his superiors, is liable to the plaintiffs in an action upon the case for negligence.

The negligence upon which the action is founded consisted in not sufficiently examining the certificate of freedom produced,

and comparing the description it contained with the person of the slave who brought it.

The authorities cited by the plaintiff's counsel, to show that the action for negligence will lie against the agent, or servant, are *Bush v. Steinman*, 1 B. & P. 210; *Stone v. Cartwright*, 6 T. R. 411; *Stephens v. Elwall*, 4 M. & Sel. 259; *Little v. Barreme*, 2 Cranch, 179; and 1 Chitty on Pleading, 67.

The case of *Bush v. Steinman*, was an action against the master; and the question did not arise, whether the servant was liable for laying the lime in the road, by which the plaintiff's carriage was overturned. But Mr. Justice Rook said — "The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed."

This is but a *dictum*, and it is evident that the judge was not contemplating the distinction between actions for negligence and actions for misfeasance, and the case before him was rather a case of misfeasance than of negligence; the laying of the lime in the highway being in itself a nuisance. That *dictum*, therefore, may and ought to be considered as applicable only to the case of misfeasance.

The next case cited is *Stone v. Cartwright*, 6 T. R. 411. That was an action against a "middle-man." It was neither against the person by whom the injury was actually committed, nor the person from whom the authority flowed, and for whose benefit the work was carried on. But Lord Kenyon said — "In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner, for whom the act was done." The act complained of in that case was the digging under the plaintiff's house, in a mine or coal-pit, so negligently as to injure the building. The reporter states that, at the trial, "Lord Kenyon was of opinion that the action could not be maintained against the defendant, who was the middle-man, but that it ought to have been brought either against the person who actually committed the trespass, or concurred therein; or against the superior, the owner of the colliery, for whose benefit the work was carried on."

In this case the attention of the judge was not drawn to the distinction between cases of negligence and cases of misfeasance; but it is evident that he was contemplating the case of misfeasance.

The next case is *Stephens v. Elwall*, 4 M. & Sel. 259. That was a case of trover for the plaintiff's goods, received and dis-

posed of by the defendant, for the benefit of his master. The court held it to be a conversion, and the defendant to be a tortfeasor, a wrongdoer. This, therefore, was not a case of negligence, but of misfeasance.

So, also, was the case of *Little v. Barreme*, cited from 2 Cranch, 179, in which C. J. Marshall says — “The instructions cannot change the nature of the transaction, or legalize an act, which, without those instructions, would have been a plain trespass.”

Chitty, in p. 67, only says, that all natural persons are liable to be sued for their own tortious acts.

None of the authorities cited supports the doctrine, that the servant is personally liable to a third person for his negligence, in transacting the business of his master; and that he is not so liable is clearly shown by the following authorities.

Chitty on Pleading, vol. 1, p. 75, says — “A servant or deputy cannot, in general, be sued for a mere nonfeasance; but the action must be against the principal. But, for misfeasance or malfeasance, an action may, in some cases, be supported against a servant or deputy;” and cites 12 Mod. 483; Cowp. 403.

The same principle is cited by Paley, on Agency, 313, c. 6, § 2, who says — “Servants are responsible for tortious acts, whether done by authority of their masters or not; but for mere nonfeasance, or non-performance of duty, servants are not liable to third persons, but only to their masters. For there is no privity of consideration between the servant and the person who employs his master; and nonfeasance alone will not support an action, without consideration, though misfeasance will.”

We find the principle thus stated by Lord C. J. Holt, 12 Mod. 488 — “A servant or deputy, as such, cannot be charged for neglect, but the principal only shall be charged for it; but, for a misfeasance, an action will lie against a servant or deputy, but not as a deputy or servant, but as a wrongdoer.” This doctrine has been repeated and ratified in a subsequent case, *Sayer*, 41.

“The case of masters of ships, who, though in some respects servants of the ship-owners, are liable to the owners of goods put on board, for negligence, rather admits than contradicts the principle of this rule; for, in the case which decided that point, (*Morse v. Shue*, 1 Vent. 190, 238,) to the objection that the master was but a servant to the owner, it was answered, that the law takes notice of him as more than a servant. He may impawn the ship, and sell *bona peritura*; he is rather an officer than a servant.”

So in the case of *Rowning v. Goodchild*, a deputy-postmaster,

5 Burr. 2721, the same general principle is admitted; and that case is taken out of it, by saying that postmasters "are subsisting, substantial officers, and answerable for their own misfeasances and nonfeasances. They have original offices under the postmaster-general."

So Blackstone, in his Commentaries, B. 1, p. 431, says — "If a servant, by his negligence, does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant."

And Chitty, in his note to this passage of Blackstone, says — "A servant cannot, in general, be sued by a third person for any neglect or nonfeasance which he is guilty of, when it is committed in behalf of, and under the express or implied authority of his master."

So also Starkie, on Evidence, part 4, p. 332, says — "An action for negligence of this nature must be brought against the principal, and not against the agent, although the loss has resulted from the negligence of the latter."

Other cases might be cited to the same effect; but these are deemed sufficient to establish the principle, that the servant is not liable for the injury done to a third person, by his negligence in his master's employment. This principle coincides with the maxim, *respondeat superior*, and is reasonable in itself; for the servant could not, to an action by the injured person against him, plead the orders of his master in justification; nor could the servant maintain an action against his master for indemnity, even if what he did was in obedience to his master's orders. But if the injured person recover against the master, and he brings his action against his servant, the latter could plead his master's orders in bar of the action.

If, then, the principle be established, that the servant is not liable for his negligence or nonfeasance, but is liable for his misfeasance, the next question is, whether the case stated be a case of misfeasance or of negligence.

The case, as I understand it, is, that the defendant was imposed upon by the slave, who produced a false pass. If the defendant had been more cautious, he might not have been deceived. The fault of the defendant was his negligence.

But, according to the facts stated, he was not bound, by his orders, to be more vigilant than he was. By those orders, he was to permit every colored person to pass who could produce a certificate purporting to prove the freedom of the person presenting it. The negligence, therefore, was not so much the negligence of the defendant as of his employers, in not giving

orders for a stricter examination. There is no tortious act of the defendant stated in the case. His suffering a man to take a seat in the stage-coach was a lawful act if he was a free man; and his certificate was *prima facie* evidence of his freedom.

Negligence, therefore, is the only ground upon which the action could be sustained. But, for such negligence, we find that the defendant is not liable; and are, therefore, of opinion that the verdict should be set aside, and judgment of *non-pros* entered.

When this Court, in a prior stage of this cause, decided that one of the counts was good, the fact did not appear, (or was not relied upon,) that the defendant was only an agent, or servant; and the attention of the Court was not drawn to the distinction between the liability of a servant, in cases of negligence and in cases of misfeasance. If, upon the motion in arrest of judgment, that fact had clearly appeared upon the face of the count, and the attention of the Court had been drawn to it, it must have adjudged that count to be bad also.

Affirmed by Supreme Court of United States, February 26, 1830, but not reported. (See the mandate No. 317, trial-docket of this Court, at May term, 1830.)

JOHN MASON v. JOHN MUNCASTER.

Upon the dissolution of an injunction to stay proceedings on a judgment of the Circuit Court of the District of Columbia, damages at the rate of ten per cent. per annum must be awarded, unless it be a bill to obtain a discovery, or some part of the judgment remain enjoined.

The plaintiff in a *ca. sa.* is liable to the marshal for his poundage as soon as he has taken the body of the defendant in execution on that writ.

The plaintiff in a *fi. fa.* is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not.

If sold, and they produce less than the debt, he can claim poundage only on the amount made.

The original defendant is not liable in any form of action to the marshal; nor to the original plaintiff for the poundage; nor is he or his property liable for poundage, unless the judgment be for a sum larger than the debt due from the defendant, to be released on payment of the amount really due, with costs; for the marshal cannot, on a *fi. fa.* make more than the amount of the judgment; nor can he detain the debtor upon a *ca. sa.* for more than that amount.

If the marshal has not returned the *fi. fa.* he may proceed to execute it for his poundage.

THE injunction heretofore granted in this case to stay proceedings upon two judgments at law, obtained in this Court by Muncaster against Mason, having been dissolved, two writs of *feri facias* were issued and levied upon the land of Mr. Mason, in the county of Alexandria, returnable to December term, 1824,

but not returned, the sale of the land having been postponed by consent of the parties.

Mr. Key, for the defendant Mason, moved the Court to quash these writs, because they included damages, at the rate of ten per cent. per annum from the time of granting to the time of dissolving the injunction according to the Act of Congress of the 24th of June, 1812, § 7, and contended that the bill was for discovery, and therefore the damages should be at the rate of six per cent. per annum only.

Another question was also submitted to the Court, namely, whether Mr. Mason was liable to the marshal for his poundage fee for levying the executions on the land.

Mr. Key also contended, that the levy was invalid for want of a sufficiently certain description of the lands levied upon.

Mr. E. J. Lee, contra. The bill was not to "obtain a discovery," but was an ordinary bill for an injunction grounded upon facts which it averred the plaintiff could prove.

CRANCH, C. J., delivered the opinion of the Court, *nem. con.*

This case comes now before this Court upon a motion to quash two writs of *fi. fa.* in favor of John Muncaster against John Mason and Mr. Jones, which were issued from this Court on the 17th of May, 1824, returnable to December term, 1824, and which the marshal had levied on certain real estate of the defendant Mason, in the county of Alexandria, but which executions have not been returned; the sale of the land having been postponed at the request of Mr. Mason, and with the consent of the plaintiffs at law.

These executions were issued upon the mandate of the Supreme Court of the United States, affirming the decree of this Court, which dissolved the injunction and dismissed the bill of *Mason v. Muncaster*. One of these executions was for \$4,000 damages and costs; and by the clerk's indorsement thereon, the damages were to be released on payment of \$2,000 with interest from the 4th of January, 1819, to April 6, 1821, at the rate of six per cent. per annum, and from that date to May 12, 1824, at the rate of ten per cent. per annum, and from that time at the rate of six per cent. per annum, till paid, and costs. The other was for \$360 damages and like interest.

It was agreed by the parties in these cases, "that the court, upon a case stated shall say whether the plaintiff, John Muncaster, was, on the dissolution of the injunction of John Mason against him and others, entitled to the ten per cent. claimed for the delay occasioned by the said injunction; and so too, whether the marshal has a legal claim on the said John Muncaster for poundage fees on levying the said executions on the land of the said John Mason."

The first question is, whether the plaintiff at law is entitled to the ten per cent. for delay occasioned by the injunction ?

By the 7th section of the Act of Congress of the 24th of June, 1812, it is enacted, "That when any injunction shall hereafter be obtained to stay proceedings on any judgment rendered for money in the Circuit Court of the said district, and such injunction shall be dissolved wholly or in part, damages, at the rate of ten per cent. per annum from the time the injunction shall be awarded, until dissolution, shall be paid by the party on whose behalf such injunction was obtained, on such sum as appears to be due, including costs; and execution on the judgment enjoined, shall be issued for the same;" "provided that when the injunction shall be granted to obtain a discovery, or any part of the judgment shall remain enjoined, the Court may, if it appear just, direct that such damages shall not be paid, or only such certain portion thereof as they may deem expedient."

The statute is peremptory, that the ten per cent. "shall be" paid, unless the case be within the proviso.

As no part of the judgment remained enjoined, the only question is, whether the "injunction" was "granted to obtain a discovery."

That it was not technically a bill of discovery, is evident. It does not suggest the want of evidence of any kind, nor does it aver any material fact to be in the knowledge, much less in the exclusive knowledge, of the defendant.

The object of the injunction was to stay the execution until the Court should hear and decide upon the new facts which the defendant had discovered since giving his notes for the purchase-money. These facts were, 1st. That there is still remaining in that part of the parish of Fairfax, which continues in the county of Fairfax, a church belonging to the parish, and a worshipping congregation of Episcopalians, who claim all the rights of the parish, and consequently, a title to the land. 2d. That the legal title is still outstanding in the heirs of Daniel Jennings, who are not estopped by the deed of their ancestor, "inasmuch as the fact may be made clear and notorious, that there was no regular and legal succession, no right of representation, no identity of character and capacities between the said complainants and the original parish of Fairfax." 3d. That those heirs reside in distant States, so that they are not, and cannot be barred by the statute of limitations.

In the complainant's amended bill, filed after the injunction was awarded, he says he "hath discovered other matters and considerations, proper, as he is advised, to be suggested in support of his said original complaint."

The new facts, alleged in this amended bill, are, 1. "That there is a regularly elected vestry and wardens of the said Fall's Church, having all the powers that the said Alexandria Church can pretend to; and that D. D., W. B. R., &c. &c. are the vestry; and that B. G. T. and D. F. D., are the church-wardens thereof, duly elected by the said vestry; so that your orator is fully enabled to show to your honors, not only that such outstanding title might exist," "but that such title now actually resides in competent parties, *in esse* who have never relinquished, but on the contrary do assert the same." 2. "That your orator, upon inquiring into the nature and occupancy of the said glebe, has been most credibly informed, and does verily believe, that it was always considered and used as the common property, and to the common benefit of both churches in the said parish. That until the mansion house on the said glebe was destroyed, the rector of the whole parish, having charge of both the churches, resided therein, and cultivated the glebe, and that after his removal to Alexandria, the rents of the said glebe were applied equally to the use and benefit of both the said churches." 3. "That the grantor, D. Jennings, is dead, and has left as his representatives, two sons, Daniel Jennings, and Owen Jennings, residing, as your orator is informed and believes, one in the State of Kentucky, and the other in Louisiana."

There is no averment that the complainant is unable to prove any of these facts, nor that they were known to the defendant. There is a general prayer, that the defendant may answer the allegations of the bill, but there are no particular interrogatories.

If this be an injunction granted "to obtain a discovery," it would be very difficult to conceive of one which is not. It seems to us to be only the ordinary and common case of an injunction to stay execution. The rule adopted by the Act of Congress in such cases is, that the ten per cent. must be paid; the exception applies only to extraordinary cases.

The second question is, Whether the marshal has a legal claim for poundage on levying the executions on the land of the complainant?

It is understood that the land has not been sold, but was liable to be sold, and had been advertised; but that the sale has been postponed by the agreement of the parties, without prejudice to the rights of the marshal.

One objection to the claim of poundage is, that there was no valid levy, because the land is not sufficiently described.

The executions are not yet returned, and are still in the hands of the marshal; but they are exhibited with the schedule and appraisement; by which it appears that the beginning of the

tract is at the end of the lower line of Patterson's land, where it touches the river Potomac. There is nothing to show that the other boundaries are not all correct. Apparently they are sufficiently certain. We cannot say that the levy is invalid for want of certainty.

The question then is, whether the marshal is entitled to his poundage fee for levying on land which is not sold?

By the Act of Congress of the 27th of February, 1801, § 9, [2 Stat. at Large, 103,] the marshal was entitled to receive the same fees, perquisites, and emoluments which were by law allowed to the marshal of the United States for the district of Maryland.

By the Act of March 3, 1807, [2 Stat. at Large, 430,] the marshal, for services not enumerated in that or some other Act of Congress, is entitled, if performed in the county of Washington, to such fees as were, on the first Monday of December, 1800, allowed by the laws of Maryland to a sheriff for like services; if performed in the county of Alexandria, to such fees as were then, by the laws of Virginia, allowed to a sheriff of a county in Virginia.

The poundage fee is not expressly given, or regulated by any Act of Congress.

By the Statute of Westminster, 1, c. 26, no officer shall take any reward to do his office, but of the king; and by 29 Eliz. c. 4, no sheriff shall "receive or take of any person for serving an execution on the body, lands, goods, or chattels of any person, more or other consideration or recompense, than twelve pence of and for every twenty shillings that he shall levy or extend and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution." That act does not contain the word poundage. The 3 Geo. 1, c. 15, § 14, uses the word "poundage," and calls it "poundage, allowance, or reward." By the 16th section of the same act, it is enacted, "that it shall not be lawful for any sheriff, by reason or color of office, or by reason or color of executing any writ or writs of *habere facias possessionem aut seisinam*, to ask, demand, or receive any other or greater consideration, fee, gratuity, or reward, than twelve pence of every twenty shillings of the yearly value." And by the 17th section, it is enacted, "that poundage shall in no case be demanded or taken upon executing any writ of *ca. sa.*, or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff," under the penalty of treble damages to the party aggrieved; but the statute does not say whether the party aggrieved be the plaintiff or the defendant, nor which of them is

bound to pay the poundage. By the statute of 8 Geo. 1, c. 25, § 3, it appears that the halfpenny in the pound upon recognizances was to be paid by the prosecutor; and by the 5th section, the sheriff upon such recognizances is to take only the same fees as are appointed by the statute of 3 Geo. 1.

By the Act of Maryland of 12th of October, 1753, c. 22, it is enacted, "that no officer, by reason or color of his office, shall have, receive, or take of any person any other or greater fees than by this act are allowed;" "to a sheriff serving an attachment or execution, 7 lbs. of tobacco," &c.

The Maryland Act of 1779, c. 25, gives "to the sheriff the same fees on a *fieri facias*, or replevin, as upon attachments;" and "for all goods and chattels which he shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on an execution."

And by § 5, "on the service of any execution for money or tobacco, the sheriff, for the service of the same, shall charge and receive on the same at the rate of 10 per centum on the first £5, &c. and 5 per centum for the residue; and no sheriff shall be chargeable in any action of escape for more than the sum of money really due, or indorsed to be received on the execution in discharge thereof."

It does not clearly appear by any of these statutes who is in the first place liable to the marshal for his poundage, if the defendant be taken on a *ca. sa.* — the plaintiff or the defendant.

The case of *Le Viscount de London v. Mitchell*, 1 Rol. Rep. 404, (anno 1616,) was an action of debt by the sheriff against the plaintiff in the execution, for his poundage fees upon a *ca. sa.* Lord Coke said, "If he has not an action of debt he has no remedy; and, therefore, forasmuch as the words are that he shall have, receive, and take, this makes it a duty in him, and so the action lies; *quod fuit concessum per curiam.*"

The case of *Welden v. Vesey*, Popham, 173, was debt by the sheriff against the creditor for £7 0s. 6d. for poundage on £181, for which the debtor was taken on a *ca. sa.* It was decided that the sheriff should have 5 per centum on the first £100, and $\frac{2}{3}$ on the residue; and Whitlock, J., was of opinion that the sheriff may refuse to do execution until the levying money be paid to him; but that point was not decided.

In the following cases the sheriff recovered his poundage against the plaintiff: *Brockwell v. Lock*, 1 Salk. 331; *Peacock v. Harris*, *Ibid.*; *Jayson v. Rash*, 1 Salk. 209; *Lyster v. Bromley*, Cro. Car. 286; *Earl v. Plummer*, 12 Mod. 124; *Tyson v. Parke*, 1 Salk. 333; *Pope v. Hayman*, Holt's Rep. 317; *Suliard v. Stampe*, Moore, 468; *Gurney and Stone's case*, Cro. El. 335.

In all these cases the action was against the plaintiff in the execution ; and there is no case in which the marshal or the sheriff brought his action for poundage against the original debtor in the execution.

In *Earl v. Plummer*, the action was brought by the sheriff for his poundage on executing an erroneous writ, and the Court said, " that if the party himself will take out such an erroneous writ, he shall not, under pretence thereof, cheat the sheriff of his fees."

Woodgate v. Knatchbull, 2 T. R. 148, was an action upon the case under the 29 Eliz. c. 4, by the defendant in a *fi. fa.* against the sheriff for damages, for taking more than his poundage, for levying the *fi. fa.* Verdict for the plaintiff, £54 14s. A rule was granted to show cause why the verdict should not be set aside. The counsel, in arguing in support of the rule, said: " The mischief intended to be remedied by the act of Elizabeth, was the negligence of the sheriffs in executing process ; persons who had recovered judgments being obliged to pay money to sheriffs to induce them to do their duty properly in levying the sums recovered. This was to be remedied by allowing the sheriff so much in the pound for the sum levied, as a stimulus to him ; but to prevent him from charging the plaintiffs in the original suits with more than was allowed, the act gave the two remedies therein specified. They, therefore, were the only persons intended to be benefited by such pecuniary compensations, and not the defendants." Buller, J., says, " If the plaintiff choose to have an auction, he must pay the expenses out of his own debt to be levied ; for there is no color to charge the defendant with it. The sheriff can only levy on the defendant that sum which is given by the judgment of the court."

(The judgment was for £200 ; but the *fi. fa.* was indorsed to levy £116, besides the costs of levying and the sheriff's fees.)

Buller, J., further said, " Then the only remaining question is, whether, in this case, it appears that the plaintiff is the party grieved. The first execution was what struck me as a ground for this doubt. The judgment there was for £200. The sheriff was at liberty by the judgment of this court to raise £200, but no more ; and the expenses of levying must have been paid out of the debt. For in actions on simple contract, and judgment for a debt certain, the expenses of levying must be paid by the plaintiff, and not by the defendant ; so that if the sheriff overcharge, the plaintiff is the sufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expenses of the execution ; and in those

cases the defendant is the party injured by the sheriff's taking more than he ought."

Grose, J., said, "At common law, no fee whatever was allowed to the sheriff; then if he be entitled to receive any, it must be by act of parliament. Now by looking into the act it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied, and that the sheriff should only levy what was really due."

In *Bonfous v. Walker*, 2 T. R. 126, which was debt against the sheriff for an escape, the court decided that the plaintiff was entitled to recover against the sheriff all that he had a right to receive from the debtor who had escaped, including the poundage; and Buller, J., said: "For poundage is part of the debt, and the prisoner could not have been discharged out of execution without paying the poundage, and therefore if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt."

The case of *Lake v. Turner*, 4 Burr. 1981, was debt by the sheriff for poundage on a *ca. sa.* in favor of the defendant, against Gibbs, who was arrested by the plaintiff. The only ground of defence was, that the *ca. sa.* was prosecuted at the instance and for the benefit of the king, who, not being named in the statute 29 Eliz. c. 4, is not bound by it, and therefore not liable for poundage. But this defence was, upon demurrer, adjudged bad, and the plaintiff had judgment.

In *Alchin v. Wells*, 5 T. R. 470, it was held that if a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods; and if the sheriff, notwithstanding the compromise, satisfy himself for the poundage on the debt, the court will not rule him to return the writ.

The case of *Fisher v. Beatty*, 3 Har. & McH. 148, was an action of replevin for goods taken by the defendant, as sheriff, to satisfy his poundage and other fees due on a writ of *fi. fa.* and a *venditioni exponas*, which last writ was countermanded before execution, and so returned by the sheriff before he took the goods in execution for his poundage. The general court decided that the sheriff could not execute, in that case, for his poundage, and that the defendant in an execution is not liable to the sheriff for his poundage.

In the case of *Maddox v. Cranch*, 4 Har. & McH. 343, the general court decided that the plaintiff in an attachment was liable for poundage.

In *Stewart v. Dorsey*, 3 Har. & McH. 401, the defendant had been taken in execution by the plaintiff, (the sheriff,) at the suit

of the State, who agreed to release the defendant, on his paying all legal costs, and the defendant promised to pay the poundage to the sheriff, who thereupon discharged him. The court gave judgment for the sheriff in an action against the defendant on that promise.

A manuscript report of *Howard v. The Justices of the Levy Court of Ann Arundel*, in 1805, was cited in this Court in April, 1821, in the case of *Ringgold v. Nicholls*, in which the general court, after full argument, decided that the defendant, and not the plaintiff, is liable to the sheriff for poundage; and upon that decision this Court (MORSELL, J., absent, and the other judges doubting,) decided the case of *Ringgold v. Nicholls*. Letters were read by the counsel in that cause, from Mr. Harris and Mr. Taney, stating that the question was still open in Maryland, and from Mr. Williams, that the Court of Appeals had decided that the plaintiff is not liable to the sheriff for poundage when the defendant is discharged under the insolvent law.

By the consideration of all these cases we are led to the conclusion :

1. That the plaintiff in a *ca. sa.* is liable to the marshal for his poundage as soon as he has taken the body of the defendant in execution upon that writ.

2. That the plaintiff in a *feri facias* is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not. If sold, and they produce less than the debt, he can claim poundage only on the amount made.

3. That the original defendant is not liable in any form of action, to the marshal, nor to the original plaintiff, for the poundage; nor is he or his property liable for poundage, unless the judgment be for a sum larger than the debt due from the original defendant, to be released on payment of the amount really due, with costs; for the marshal cannot, on a *fi. fa.*, make more than the amount of the judgment, nor can he detain the debtor upon a *ca. sa.* for more than that amount.

4. That in the present case the marshal, not having returned the *fi. fa.*, may proceed to execute it for his poundage; and in this way only has the marshal a legal claim on the defendant in this cause for the poundage, unless he shall have promised to pay it, upon good consideration.

See 2 Tidd, 1035, Phila. Ed. 1828, upon Stat. 43 Geo. 3, c. 46, § 5.

THOMAS LAW v. PHILIP STEWART AND JOHN P. INGLE.

The maker and indorser of a promissory note made and indorsed to be discounted

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for the accommodation of a third person, are not in the usual course of mercantile transactions co-sureties; and the indorser is not bound to contribute with the maker in paying the note, unless there was some previous agreement to that effect.

Goods conveyed in trust to indemnify the landlord and his indorser against their responsibility upon a note made by the landlord, and indorsed by a third person, for the accommodation of the tenant, and left upon the premises by the consent of the landlord, are not liable to his distress for rent accruing after the deed of trust, while the third person remains liable as indorser of the note.

BILL IN EQUITY, to charge, with the rent due from Robert Bailey to Mr. Law, the funds in the hands of Mr. Ingle, arising from the sale of goods conveyed in trust by Mr. Bailey to Mr. Ingle, to indemnify Mr. Law (the plaintiff) and General Stewart (the defendant) for any loss they might sustain by reason of certain notes made by Mr. Law, indorsed by General Stewart, and discounted for the use of Bailey. The goods, at the date of the deed of trust, were in the possession of Bailey in Mr. Law's house, of which Bailey was tenant; no rent being then due. After the notes were protested, Mr. Law ordered Mr. Ingle, who was his general agent, to distrain those goods for rent; which he did, and sold them, either under the distress or the deed of trust. General Stewart forbade him to pay the proceeds to Mr. Law on account of the rent, contending that the deed of trust was a prior lien, and the goods were upon the premises with the permission of Mr. Law, for the security of himself and General Stewart against the notes.

The proceeds of the sales of the goods were not sufficient to pay either the rent or the notes, much less to pay both.

Mr. Law, in his bill, also claims of General Stewart one half of what he, Mr. Law, has been compelled to pay upon the notes; averring that, upon Bailey's request, he, Mr. Law, and the defendant, Stewart, "did consent so to aid the said Bailey," that is, by indorsing Bailey's note. The bank, however, would not discount a note with Bailey's name upon it; but offered to discount a note made either by Mr. Law, or General Stewart, and indorsed by the other. Whereupon a note for \$2,000 was made by Mr. Law, payable to and indorsed by General Stewart, and discounted at the Patriotic Bank for the use of Bailey; afterwards a like note for \$1,000 was made and indorsed, and discounted at the Bank of Washington, also for the use of Bailey, who made a deed of trust of the goods in the house to Mr. Ingle; which recites, that "whereas the said Thomas Law has become principal in a certain note, for the use of the said Bailey, and Philip Stewart has indorsed, as surety of the said Thomas Law, according to the usual mode of carrying on business at the Patriotic Bank." "And whereas the said Bailey is

desirous of indemnifying and saving harmless the said Thomas Law and Philip Stewart against all suits, damages," &c., "in consequence of their becoming principal and indorser, as aforesaid," &c. &c. And the trust is "to pay and indemnify the said Thomas Law and Philip Stewart, the drawer and indorser of the said note," the money, damages, and costs, &c., which they may have paid or suffered, &c., "by reason of drawing and indorsing said note."

The answer of Stewart denies that there was any agreement or understanding between him and Mr. Law, to contribute by moieties, or in any other way, in any loss that might be sustained.

The answer of Mr. Ingle, which was admitted as evidence, says, that he "cannot say, of his own knowledge, that it was understood between the parties, that the drawer and indorser should be equally responsible for the payment of the notes," but that such was his belief from all that had passed; and that "he always regarded them as joint securities for the debt of Bailey."

This is the whole evidence in the cause upon this point.

CRANCH, C. J., delivered the opinion of the Court.

The COURT is clearly of opinion that, under the circumstances stated in the bill and answer, Mr. Law has no equitable claim to have his rent first satisfied out of the trust fund. The deed of trust created a prior lien; and the goods were upon the premises with Mr. Law's consent, for the purposes of the trust.

As the trust fund has proved insufficient to pay the notes, the question arises, whether General Stewart is liable to contribute to make up the balance due upon them. According to the usual course of mercantile transactions he is not. In order to make him so, there must have been an agreement, or an understanding amounting to an agreement, to that effect.

The bill does not aver any such agreement or understanding, although it prays relief to that extent.

The answer denies any such agreement or understanding. This denial is strongly corroborated by the terms of the deed of trust, and by the facts stated by General Stewart, in answer to an allegation in the bill, that, upon one of the renewals of the note, the defendant, Stewart, became the drawer, and Mr. Law the indorser. Throughout the whole deed of trust, the distinct character of drawer and indorser, and of principal and surety, is kept in view.

We think, therefore, that General Stewart is not liable to contribution, and that, on both points, the bill must be dismissed, with costs.

BANK OF COLUMBIA v. JAMES DUNLOP'S HEIRS.

A vendee coming into equity to obtain the legal title of a lot upon which the purchase-money has been fully paid, must pay the balance due to the vendor upon other lots.

CRANCH, C. J., delivered the opinion of the Court.

Under the decree of this Court for the sale of the real estate of the late James Dunlop, deceased, for the payment of his debts, the trustee sold seventeen feet front on High Street, being part of lot No. 88 in H. & B.'s addition to Georgetown. The sales reported by the trustee were all ratified by the Court, except this, which was reserved for consideration, upon exceptions to the report filed by the purchaser and by the creditors of Abraham Wingard, who contended that this part of the lot was not the property of the said James Dunlop, but of the said Wingard.

The facts were these. In 1803, this part of the lot was sold by the late Mr. James Dunlop to Mr. Abraham Wingard, who paid the whole purchase-money, but did not get a conveyance of the legal title, which remained in Mr. Dunlop, the vendor. In 1814, Mr. Dunlop sold to Mr. Wingard the residue of the lot, being thirty-nine feet front, for \$3,000, and received \$985 in part payment.

In January, 1820, Mr. Wingard died insolvent, not having received the legal title to any part of the lot. Judgments had been recovered against him in his lifetime to a greater amount than the value of all his property.

On the 31st of May, 1821, Mr. Dunlop filed a bill against Mr. Wingard's heirs and representatives, for the sale of the thirty-nine feet front, to pay the balance of the purchase-money; and claiming also a lien on the seventeen feet front first sold, in case the other should not be sufficient to pay that balance, which amounted to more than \$3,000.

A decree was obtained; and, on the 19th of February, 1822, Mr. Dunlop, at the sale under the decree, purchased the thirty-nine feet for \$1,350, leaving a large balance of the purchase-money still due to him from Mr. Wingard's estate.

On the 10th of October, 1821, Mr. Wingard's creditors obtained a decree for the sale of his real estate, for the payment of his debts; under which decree the trustee offered to sell the seventeen feet, but the sale was forbidden by Mr. Dunlop, on the ground that he had a lien upon it for the balance due upon the other part of the lot, and the sale was not made; but the

whole lot, after the death of Mr. Wingard, and after the 19th of February, 1822, remained in the possession of Mr. Dunlop and his heirs.

It is agreed, by the trustee for the sale of Mr. Wingard's estate, and by the trustee for the sale of Mr. Dunlop's estate, and by the purchaser, that the sale of the seventeen feet by the latter trustee shall be ratified; and that this Court shall decide which of the trustees shall have the purchase-money.

It is one of the plainest rules of equity, that he who seeks equity must do equity.

He who comes into a court of equity to redeem, or to obtain the legal title, must pay the defendant all that is justly due to him by the complainant, whether the debt be or be not strictly a lien on the property sought to be redeemed or conveyed; unless the rights of third persons, not having notice of the complainant's equity, shall have intervened.

In *Shuttleworth v. Laywick*, 1 Vern. 245, it was decided, in 1684, that "where there is a debt secured by mortgage, and also a bond debt, when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound. So if there are two mortgages, and one is defective; if he will redeem, he must take both."

The same point was decided in *Baxter v. Manning*, 1 Vern. 244, where the court said:—"Although there is no special agreement proved in this case, that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both."

So in *Purefoy v. Purefoy*, 1 Vern. 29, it was said in argument, and not denied, that "where a bill is brought to redeem two mortgages, and there is more money lent upon one of them than the estate is worth, the plaintiff shall not elect one, and leave the heavier mortgage unredeemed, but shall be compelled to take both or none."

This point is also expressly decided in *Mergrave v. Hooke*, 2 Vern. 207, where the court said:—"He shall redeem both, or neither. And so if one mortgage had been deficient in value, and the other mortgage had been worth more than the money lent upon it, the heir should not be permitted to redeem the one without the other."

So in *Pope v. Onslow*, 2 Vern. 286. The plaintiff, as assignee of a bankrupt, brought his bill to redeem a mortgage of the Manor of Newington, made by the bankrupt to the defendant. The defendant, in his answer, stated that he had previously lent the bankrupt £200, on an insufficient mortgage, and, afterward, £300 on the mortgage of the Manor of Newington, which was

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of better value than the money due upon it. *Per Curiam* : — “ If the plaintiff will redeem one, he shall redeem both.”

See also the cases cited by the Master of the Rolls, in *Jones v. Smith*, 2 Ves. Jr. 376, 377, where he says, that “ the case of the assignee is not better than that of the original mortgagor.” He considered the case before him as a case of pledge, and not of mortgage ; and, therefore, permitted the plaintiff to redeem one fund without the other, but his decree was reversed in the House of Lords.

Maddock, vol. 1, p. 528, says : — “ Nor, where there are two separate mortgages of different estates to the same person, can the purchaser of the equity of redemption of one of them redeem that mortgage only ; if he redeem at all, he must redeem both.”

The case of a vendor, who sells two separate parcels of land to the same vendee, and retains the legal title, does not differ in principle from that of a mortgagee who holds two separate mortgages. The vendor has all the rights of a mortgagee. Even if he has parted with the legal title, he has a lien on the land in the hands of the vendee, and all claiming under the vendee, with notice, unless he has waived that lien. In such a case, however, if the vendor comes into a court of equity to enforce his lien, he cannot, I apprehend, make one parcel of land answer for the debt of the other, if they have got into several hands, even with notice. But when the vendee comes into a court of equity, to get from the vendor the legal title, then he must pay off both debts ; not because the vendor has a lien upon one parcel for the debt of the other, but because the court will compel him who seeks equity to do equity.

This is the principle which governs all these cases, and to which they are all to be referred.

We are, therefore, of opinion that the trustee for the sale of Mr. Dunlop's estate has a right to retain the purchase-money of the seventeen feet of land, for the purposes of his trust.



JOHN LITTLE v. JOHN OTT'S HEIRS AND P. B. KEY'S HEIRS.

W. B., a lessee for ninety-nine years, renewable forever, at a certain rent, of a house and lot in Georgetown, D. C., sold to G. M., by deed of bargain and sale, the demised premises, together with other lots and lands, in which he had a fee-simple estate, “ to have and to hold the aforesaid lots or parcels of land, to the said G. M., his heirs, executors, administrators, or assigns, forever,” with general warranty of “ the said lots or parcels of land ;” *held*, that G. M. acquired the legal estate in the term for years only, although the said W. B. had then an equitable title to the reversion ; and that nothing passed by the marshal's sale under a *fi. fa.* against G.

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M. but the term for years ; and that the subsequent sale of the reversion by W. B. to P. B. K., and a conveyance to him from the original lessor, were valid, and transferred the reversion to P. B. K.

A legal term for years does not merge in an equitable title to the reversion.

BILL OF INTERPLEADER, by John Litle against John Ott's heirs and the heirs of P. B. Key, both of whom claimed the ground-rent from the plaintiff, who was the tenant in possession, under a lease from the administratrix of John Ott.

John Ott's title was under the marshal's sale in June, 1804, upon a *fi. fa.* against George Magruder, whose title was by a deed of bargain and sale to him from William Bailey, on the 1st of June, 1798, purporting, in consideration of £3,000, to convey "one house and lot in Georgetown, at the corner of High and Falls Street, the half square opposite to where Colonel William Deakins formerly lived in the aforesaid town ; also a tract of land on the west side of the eastern branch, &c., containing 206 acres, more or less : 'To have and to hold the aforesaid lots or parcels of land unto the said George Magruder, his heirs, executors, administrators, or assigns, forever ;" with general warranty to the said G. M., his heirs and assigns, forever.

When W. Bailey made this deed, the only legal estate which he had was the leasehold estate for ninety-nine years, subject to a ground rent, upon a lease to him made by John and Lucy Addison, December 9, 1783 ; but he had purchased the reversion of Charles Lowndes, who had purchased it of Anthony Addison, who had purchased it of John and Lucy Addison, in whom the legal estate still remained.

After the deed from W. Bailey to George Magruder, to wit, on the 24th of October, 1798, he, W. Bailey, sold the reversion to P. B. Key, to whom it was legally transferred by Anthony Addison on the 23d of January, 1800, to whom it had been legally conveyed by John and Lucy Addison, the original lessors, upon the 6th of September, 1799 ; so that Mr. Key obtained the legal estate in the reversion, without its passing through W. Bailey, and without notice, as it was alleged, of any claim by George Magruder to the reversion, or any part of it.

The principal question in the case was, whether John Ott died seized of an estate in fee, or only possessed a leasehold estate in a house and lot at the south-west corner of Water and Falls streets in Georgetown, being part of the original lot No. 47, in that town.

Mr. Marbury and *Mr. Key*, for Mr. Key's heirs, contended that nothing passed to George Magruder by the deed of W. Bailey, but the legal estate which Bailey then had, which was only a

leasehold estate ; that the term did not merge in the equitable title to the reversion ; and that Mr. Bailey did not intend to sell the reversion of the house and lot ; for although the *habendum* is to G. M. and his heirs, yet it is also to his executors and administrators, which are wholly inapplicable to an estate in fee, and the word "heirs," is satisfied by application to the other property, conveyed in the same deed, and in which Mr. Bailey had the fee-simple estate. It would have been a fraud in him to sell the reversion to Mr. Key after having sold it to G. M. That Mr. Key had obtained the legal title to the reversion without its passing through Mr. Bailey, and without notice of any claim to it by G. M., they cited 3 Preston on Conveyances, 7, 25, 28, 566, 569 ; 1 Cruise, Dig. 509, 515, and *Willoughby v. Willoughby*, 1 T. R. 770.

Mr. R. S. Coxe for Ott's heirs. Mr. Bailey had the equitable reversion in fee ; and although the term did not legally merge in the equitable title to the reversion, yet the term is attendant upon the inheritance to protect the equitable reversion from intermediate incumbrances. The deed of Bailey to G. M. was an assignment of Bailey's equitable as well as legal estate. Mr. Coxe cited Sugden on Vendors, 131 ; *Philips v. Clarkson*, 3 Yeates, 124 ; and *Phillips v. Bonsal*, 2 Binn. 138.

CRANCH, C. J., after stating fully the facts of the case, and the argument to show that the ground-rents sold by Mr. Bailey to Mr. Key included the ground rent of the lot sold to George Magruder, delivered the opinion of the Court.

Mr. Bailey's deed to George Magruder passed only the legal estate in the term for years which Mr. Bailey possessed. It could not, contrary to his will, transfer any equitable right which he possessed ; so that Mr. Magruder, in consequence of that deed, acquired no right to call upon Mr. Key to convey to him the reversion in fee, even if he had received notice of that deed, of which there is no evidence ; so that he stood in the predicament of a purchaser of a legal estate without notice of an equitable incumbrance, if any existed.

It is true that the words of the deed are sufficient to carry the fee if Mr. Bailey had been competent to convey a fee ; but as he was not, they can only be used as evidence of his intention to convey a fee. But he used also other words which are not usual nor necessary in conveying a fee ; and which are appropriate to the conveyance of a chattel interest only ; namely, "executors and administrators." The expressions are, "To have and to hold the said lots or parcels of land, unto the said George Magruder, his heirs, executors, administrators, or assigns, forever." The property conveyed by that deed consisted not

only of the lot in question, but of "the half square opposite to where Col. William Deakins formerly lived," "and a tract of land on the west side of the eastern branch," &c., containing 206 acres; so that the word "heirs," was necessary to the conveyance of the whole estate in part of the property, and may have been intended to be confined to that part of the property to the conveyance of which it was necessary, and the words, "executors and administrators," may be considered as appropriated to the chattel interest. The use of the word "heirs," therefore, is not conclusive evidence of the intention, nor is there any other evidence that it was the belief or understanding of Mr. Magruder at the time of the contract, that he was purchasing the fee-simple; and we have seen clearly, from the contract and conduct of Mr. Bailey, that such was not his intention or understanding. We think, therefore, that Mr. Magruder had no equity which he could set up against Mr. Key's legal estate in the ground-rents. It is certain that the reversion in fee did not pass to Mr. Magruder, and Dr. Ott could not, at the marshal's sale under a *fiery facias* against Mr. Magruder, acquire any thing more than Mr. Magruder's legal title, such as it was. He could acquire only the legal estate in the term for years.

It was contended in argument, that when the tenant for years obtained an equitable title to the reversion in fee, the term merged in the equitable reversion. But merger is the legal effect of the coincidence of legal rights only. There is no instance of the merger of a legal title in an equitable, so as to extinguish the legal title. The cases cited by Preston, in his treatise upon the doctrine of Merger, in p. 7, 25, 28, 566, 569, are decisive upon this point. The *dicta* cited from 3 Yeates, 124, and 2 Binney, 138, in *Phillips v. Clarkson*, are loose, and rather inaccurate admissions by the Court; and it is evident that the Court was not contemplating the distinction between the coincidence of a legal with a superior legal estate, and that of a legal with an equitable estate. The reference which the judge makes is evidently to the common legal doctrine of merger.

Mr. Key and his heirs seem to have been in the uninterrupted seizin of the reversion and the ground-rent, from January, 1800, to the year 1825, when this dispute originated; so that they are protected by limitation of time as well as by an actual legal title.

We are therefore of opinion, that the title of the late John Ott, the ancestor of the defendants, Mary C. Beatty and John W. Ott, was a chattel interest,—a term for years, and not a fee-simple,—and that the reversion in fee is in the defendants, the

Hazel v. Waters.

heirs of the late P. B. Key, and that the right to the term of years is in the administrator *de bonis non* of the said John Ott. Decree accordingly.

UNITED STATES, for the use of ROBINSON, v. N. L. QUEEN.

The Act of Assembly of Maryland, 1720, c. 24, respecting suits upon administration bonds, before return of *non est* or *fi. fu.* against the executor or administrator, is in force in the County of Washington, D. C.

DEBT on the administration bond of George Lindsay's administratrix. Plea, that there was no return of *non est* on a *capias ad respondendum*, nor of a *feri facias* against the administratrix, as required by the Maryland Act of 1720, c. 24. General demurrer.

The COURT rendered judgment upon the demurrer for the defendant, being of opinion that the Act of 1720 is still in force, notwithstanding the Act of 1798, c. 101, ch. 8, § 9, which authorizes an execution against the administrator, upon the report of the auditor, ascertaining the plaintiff's proportion of the assets. (THRUSTON, J., absent.)

ZACHARIAH HAZEL v. JOHN WATERS and his Sureties.

In debt upon a constable's bond for not conveying to the plaintiff property alleged to have been sold by the defendant under a *fi. fu.*, the breach is defective in not stating that the execution was levied upon the property, and that the lots were the property of the defendant in the execution, and in not describing the property with sufficient certainty; and is bad, in averring an alternative breach, namely, in not conveying the property to the plaintiff, or in not permitting him to take possession of it.

Quære, whether a constable who sells real estate under a *feri facias* is bound to give a deed to the purchaser: Whether the return of the officer is traversable in a collateral action.

DEBT upon a constable's bond.

The declaration sets forth the condition and breach thus:—If the said John Waters "shall well and faithfully execute the duties and office of constable in and for the said county of Washington, in all things appertaining to the said office; and shall also well and truly account for and pay over all sums of money received by him; and shall also duly and faithfully perform all the duties and trusts reposed in him, by virtue of the Act of Congress, entitled an act to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," then, &c.

The breach alleged is, "That whereas a writ of *feri facias*, issued by C. H. W. Wharton, Esq., one of the justices of the

peace for the county aforesaid, to the said John Waters directed, came to his hands, by virtue of which writ he duly advertised for sale all the right, title, and interest of one Joseph Johnson, in and to lot No. 7, and the east part of lot No. 8, and the east part of lot No. 9, in Square 455 in the city of Washington, in the county aforesaid; and proceeded to sell to the highest bidder at public auction the said property; at which said sale the said T. Hazel became the highest bidder, and was ready and willing and did offer to comply with the terms of sale mentioned in the advertisement under which the said property was sold, and thereby became the equitable owner of the said property, and was entitled to receive a good and sufficient conveyance of all the right and interest of the said Joseph Johnson in and to the said property; and the said John Waters was bound by the duties of his office, as constable as aforesaid, to make such a conveyance to the said Hazel; yet the said John Waters, in neglect and contempt, and violation of his duty as such constable, refused to convey the said property to the said Hazel, or to permit him to take possession of the same, but proceeded to sell and convey, and did actually sell and convey the said property to one J. P. Van Ness, or some other person or persons; by means whereof the said Hazel has been wholly deprived of the possession and enjoyment of the said property and every part and parcel thereof; by means whereof an action hath accrued to the said United States to demand and have, by their attorney, for the use of the said Hazel, the sum of two thousand dollars," &c.

Upon the issue of performance, a verdict was rendered for the plaintiff for 53 dollars damages.

The defendant moved in arrest of judgment.

The case was argued by *Mr. C. C. Lee* for the plaintiff, and by *Mr. Wallach* for the defendant.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., dissenting.)

The defendants contend that the declaration does not show a breach of the condition of the bond.

The declaration does not state that the defendant Waters levied the *fieri facias* upon the property sold. If he did not, he had no right to sell it, and the plaintiff Hazel acquired no right to a conveyance or possession of it, and the defendant Waters was guilty of no breach of his bond by not conveying, or by not permitting Hazel to take possession of it. But if the execution had been levied upon the property, and if it had been duly sold by the constable to the plaintiff Hazel, I do not know any law which requires the officer to make a deed. This deed would convey nothing, for no title vested in the officer. The title passes

by act of law, consequent upon the facts of lawful seizure and sale under the *fiери facias*; and notwithstanding the deed, the party claiming under the sale must prove all the facts necessary to show that it was lawfully made; such as the judgment—the execution—the seizure and sale by the proper officer, and the return of the vendee as the purchaser. For if the officer should return another person as purchaser, I doubt whether the return could be traversed collaterally in an action of ejectment brought by the vendee. His remedy, I should think, would be against the officer for a false return.

The declaration states that the interest of Johnson only, in the property, was advertised for sale, but that the property itself was sold. It does not state what interest Johnson had in the property. It might be a reversion only; in which case the vendee would not be entitled to the possession; and, if Johnson was in possession, the officer had no right to turn him out. The vendee must have brought his ejectment. But the averment of the breach is in the alternative, that the defendant Waters either refused to convey to Hazel, or refused to permit him to take possession; it is not certain which.

The declaration does not describe the property with sufficient certainty, so that it can be ascertained what it was that the officer refused to convey; “the east part of lot No. 8, and the east part of lot No. 9, in square 455.” How much is the east part of of a lot? and how is it bounded?

The declaration does not state what the terms of sale were, which he offered to comply with, nor how he offered to comply with them, so that the Court might judge whether it was such a compliance as required the officer to return Hazel as the purchaser, or as would give him a cause of action against the officer for not conveying the property.

The declaration states that Hazel, by the sale, became the equitable owner of the property. If he acquired any right under the sale, it must have been a legal right. If he acquired only an equitable right, his remedy was in equity, and not at law for the penalty of the bond.

Again: the declaration states that Hazel became entitled to receive a conveyance of all the right, title, and interest of Johnson in the property, and that Waters was bound to make him such a conveyance; but the breach alleged is, that he refused to convey the property itself.

For these reasons I think the judgment ought to be arrested.

MORSELL, J., concurred, in arresting the judgment; but did not agree that an officer who sells real estate under a *fi. fa.* is not bound to give a deed to the actual purchaser.

Judgment arrested.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1829, AT ALEXANDRIA.

UNITED STATES *v.* LOUISA CARTER.

It is a contempt of court in an acquitted female prisoner to threaten vengeance, in the presence of the Court, against the witnesses; and the Court will fine her, and order her to give security for good behavior.

A contempt in the piazza of the court house, into which the windows of the court room open, is a contempt in the presence of the Court.

INDICTMENT for larceny. Verdict, not guilty.

Clara Selden and Mary Stuart, who were witnesses in the cause, made affidavit, that while in the piazza of the court room, immediately after the verdict, the prisoner, retiring from the court, spoke certain opprobrious words, (which were stated in the affidavit,) and threatened one of them that she would give her her dose, and that she would be revenged of them both; that the prisoner is a violent tempered woman, and that they are really afraid that she will do them some personal and bodily injury.

Mr. Swann, the district attorney, thereupon moved for an attachment of contempt.

Mr. Hewitt, for the prisoner, objected.

The COURT, (*THRUSTON, J.*, absent,) considering it as a contempt in the presence of the Court, it being within the possibility of the hearing of the Court, and in the piazza immediately adjoining the court room, (the windows of which opened into the piazza,) ordered the attachment without a previous rule to show cause. And upon being brought in upon the attachment, and having, upon interrogatories, confessed the said threats, and repeated them in the face of the Court, and avowed her determination to carry them into effect,

The Court fined her one dollar, and ordered her to give security for her good behavior in 100 dollars, and in default thereof committed her to prison until, &c.

Mandeville v. Rumney.

PEYTON v. W. BRENT, JUN'R.

Upon a motion to discharge a defendant arrested upon a *capias ad respondendum* by a marshal appointed by the President *de facto* of the United States, the Court will not decide the question whether he has been duly elected to that office.

THE writ of *capias ad respondendum* having been, on motion of the defendant, returned, *cepi corpus*, the defendant in proper person, moved to be discharged from the arrest, because the commission to T. Ringgold, as marshal of this District, was issued by John Q. Adams, claiming to hold and exercise, and then actually exercising the duties of the office of President of the United States, but who was not, of right, President of the United States, inasmuch as he was not duly elected to that office agreeably to the provisions of the Constitution of the United States.

Which motion was overruled by the Court, (MORSELL, J., absent,) no other reason for such discharge being alleged by the defendant; and this motion and judgment of the Court were ordered to be entered on the minutes of the Court.

CANNELL v. MILBURN AND McFARLANE.

If the legal effect of the instrument be the same, whether the words constituting a variance be inserted or not, the variance is not material.

DEBT on a sealed note. Plea, "owe nothing" without oyer, and issue.

Mr. Neale, for the defendant, objected to the admission of the sealed note in evidence, because it contained the words "for value received," which were not in the declaration.

Mr. Hodgson, for the plaintiff.

THE COURT (MORSELL, J. absent,) overruled the objection, and CRANCH, C. J., referred to the case of *Ferguson v. Harwood*, 7 Cranch, 408, where the Supreme Court held, that if the legal effect of the instrument be the same, whether the words be inserted or not, the variance is immaterial.

MANDEVILLE v. RUMNEY.

If Sunday be the last day of grace, the demand, protest, and notice may be on Saturday, and if the protest be after bank hours on Saturday, the suit may be brought the same evening.

DEBT, against the maker of a promissory note. Sunday was

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the third day of grace, payment was demanded, and the note protested on Saturday after bank hours. The suit was brought the same evening, after protest.

Verdict for the plaintiff, subject to the opinion of the Court whether the suit was not brought too soon.

The COURT, (MORSELL, J. doubting,) was of opinion, that it was not. See Story's Chitty on Bills, and the cases cited there in the notes.

The Court was of the same opinion, in the action of the same plaintiff against Runels, the indorser of the same note.

PIPSICO, a free mulatto, v. BONTZ *et al.*, white men.

If work and labor be done according to special agreement, the plaintiff may recover upon a general *indebitatus assumpsit*.

In Alexandria, a colored man is not a competent witness for or against a white man.

INDEBITATUS ASSUMPSIT for work and labor.

The plaintiff offered evidence of a special agreement for \$100 a year, and that the service was performed according to the agreement.

The defendant's counsel objected, that there was no count upon the special agreement.

The Court overruled the objection on the authority of the *Bank of Columbia v. Patterson*, 7 Cranch, 299.

Mr. Taylor and Mr. Neale, for the plaintiff. Mr. Hooe and Mr. Hewitt, for the defendants.

The defendants' counsel offered a free mulatto as a witness for the defendants.

Mr. Taylor, for the plaintiff, objected; and cited the Virginia laws, Rev. Co. 187, December 17, 1792, c. 103, § 5, that "no negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes; or in civil pleas where negroes or mulattoes alone shall be parties." The Court rejected the witness.

HOLBROOK v. THE FAUQUIER AND ALEXANDRIA TURNPIKE CO. *et al.*

The president of the Fauquier and Alexandria Turnpike Company, without the directors, had no power to issue certificates of stock.

No certificate could be lawfully issued to a non-subscriber.

The company is not bound by the acts of its agents, unless acting within the scope of their authority; and a special agency must be strictly pursued.

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The president had only a special authority, and having exceeded it, by issuing certificates of stock without the authority of the directors, and without consideration, his act did not bind the company.

The plaintiff, not having a legal title, is not protected by the rule applicable to a purchaser without notice, which is a protection only to a legal title against an equity; not to an equity against an equity; especially when the plaintiff, by ordinary diligence, might have avoided the imposition.

BILL IN EQUITY to compel the defendants to admit the plaintiff as a stockholder, and to permit certain shares of stock to be transferred to him on the books of the company.

The cause was set for hearing on the bill, answer, replication, depositions, and exhibits. The bill stated, in substance, that the company being indebted to C. J. Love, did, to satisfy the claim, by John Love, their president, agree to let him have stock at par to the amount of his claim; that the president and directors issued, in due form of law, two certificates for ten shares each, to the said C. J. Love, duly signed by their president, and countersigned by their treasurer, as required by their charter. That another certificate was issued in favor of John Love for six shares, which he transferred to the said C. J. Love also in payment of the debt due to him by the company, but only three of them had been paid up. That the said C. J. Love, being indebted to R. B. Lee in a larger sum, directed them to be transferred to E. J. Lee, in trust for R. B. Lee. That the president certified on the back of the certificates, that the shares were so transferred. That R. B. Lee, being indebted to the plaintiff, ordered the certificates to be delivered to him, in payment, which was done. But the company refuses to suffer them to be transferred on their books; alleging that no such shares appear by their books to have been issued, and no consideration paid for them. But the plaintiff avers that they were duly and fairly issued; and that he is a purchaser for valuable consideration without notice, &c.

The answer of the company denies all the material allegations of the bill; but admits the handwriting of the president and treasurer to the certificates, which were in the usual form, and to the indorsements.

Mr. Hodgson, for the plaintiff, cited *Paley on Agency*, 229, 230, 325, 326. *Hern v. Nichols*, 1 Salk. 289; 1 Com. Dig. 240; *Baring v. Corrie*, 2 Band. a, 137; *Hove v. Oxley*, 1 Wash. 19.

Mr. Taylor, for defendants.

CRANCH, C. J., delivered the opinion of the Court.

(THRUSTON, J., absent.)

The whole evidence in this cause is contained in the answer, the depositions of E. J. Lee, and H. Peake, and in the certificates of stock exhibited.

From the evidence the facts appear to be, that the certificates

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of stock in question, were signed by the president and countersigned by the treasurer, in the form required by the sixth section of the charter, and were delivered to the said C. J. Love, by the president, without consideration; and from the circumstance that the books of the company contain no evidence of the issue of such certificates, it may be inferred that they were issued without the order of the directors. That the shares never were transferred by C. J. Love, upon the books of the company. That neither the said C. J. Love nor John Love ever subscribed for the said shares, or any of them, and never paid any consideration therefor. That the said certificates were received by Mr. E. J. Lee, as agent for Mr. R. B. Lee, from the said C. J. Love for a full and valuable consideration, and with a belief that they had been issued for a full and valuable consideration paid by him to the company; that the shares had been duly transferred to the said E. J. Lee, in trust for the said R. B. Lee, and that the plaintiff received the certificate with the same belief, and for a full and valuable consideration paid by him to the said R. B. Lee.

By the 6th section of the charter of the company it is enacted, "That the president and directors shall cause a written or printed certificate to be given to each subscriber for every share by him subscribed, signed by the president and directors, and countersigned by the treasurer; which certificates shall be transferable by an assignment made thereof, on the books of the company, by the owner in person, or by an attorney in fact."

The president of the company, without the directors, has no power by the charter, to do any act, except to sign the certificate, and to render to the courts of Fauquier, Prince William, and Fairfax, an account of the cost of the road, and of the expenses of repairs, &c. He does not appear to have had authority to make any contract for stock, nor to issue certificates of stock, nor to certify transfers; much less could he issue a valid certificate of stock not subscribed for, and without consideration. These certificates are therefore void.

But the plaintiff has been induced to part with his money by a false certificate of the president of the company. Is not the company bound to make it good?

In general, the principal is not bound by the act of his agent, unless it be within the scope of his authority; and if it be a special agency, the authority must be strictly pursued. Here the president certainly had not more power to issue certificates of stock than the president and directors had; yet, by the 6th section of the charter, they could only cause certificates of stock to be issued to subscribers. The president, therefore, was not acting within the scope of his authority, in issuing a certificate

to a non-subscriber. The authority of the president to sign certificates, was a special authority to sign certificates to subscribers, by order of the president and directors. In signing a certificate to a person who was not a subscriber, and without the authority of the directors, the president did not pursue his special authority strictly.

Upon both grounds, therefore, namely, that he was not acting within the scope of his authority, and that he did not strictly pursue his special authority, the company is not responsible for his act.

Besides, the plaintiff cannot complain of a deception which he might have avoided by ordinary diligence. The president had no authority to certify a transfer, if it had been made upon the books; much less, one not so made. But he did not certify that the transfer was made upon the books; and the plaintiff was bound to know that such only could be a legal transfer. If the certificate of the president was equivocal, it was negligence in the plaintiff not to insist on a satisfactory explanation before he took the paper.

There having been no legal transfer of the stock, the plaintiff cannot avail himself of the principle that he is a purchaser for valuable consideration without notice; for that is a plea only in defence of a legal title against a prior equity; not a substantial ground of relief for a plaintiff in equity against an equity. Whatever legal or equitable defence the company would have had against C. J. Love or J. Love, in regard to these certificates, they have against the plaintiff. The equity follows the certificates into the hands of every one who cannot, at law, avail himself of them.

I am, therefore, of opinion that the bill should be dismissed, with costs.

If the bill be dismissed as against the company, it cannot be continued against C. J. Love, and John Love, because, being non-residents, the Court has no jurisdiction as to them.

MORSELL, J., concurred. Bill dismissed with costs.

THOMAS VOWELL v. JONAH THOMPSON.

The mortgagor is, in equity, considered as the owner of the property until foreclosure or sale.

The mortgagor of stock in the Marine Insurance Company, until foreclosure or sale under the mortgage, is entitled to vote upon the stock at the election of directors, and the Court will compel the mortgagee, or his trustees, to give a power of attorney to the mortgagor to vote at such election.

BILL IN EQUITY to compel the defendant, Thompson, to give

the plaintiff a proxy or a power of attorney to vote at an election of directors of the Marine Insurance Company of Alexandria, upon 300 shares of the stock of that company transferred by the plaintiff to the defendant in trust as a collateral security for a debt due by the plaintiff to the bank of Alexandria; the plaintiff being in no default and the stock not forfeited, but still standing pledged for the debt, and the mortgagor entitled to the dividends.

The cause was set for hearing on the bill and on the answer, which admits all the facts.

The ground of relief, and the relief prayed, admit that none but legal stockholders can vote.

The question is, whether, before forfeiture and foreclosure of the mortgage or sale, under the deed of trust, the mortgagor is not entitled to vote, and, for that purpose, to obtain a proxy or power from the trustee.

This question was submitted without argument.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

In equity, a mortgagee is only considered as a trustee, and the mortgage is but a security for the money lent, and does not alter the thing it conveys. In the contemplation of a court of equity, nothing real passes to the mortgagee, and the mortgage conveys nothing in the land; neither dower, nor tenancy by the curtesy. *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 433. Lands mortgaged to a testator do not pass under a general devise, by him, of his lands, but go to his executor, as personal assets.

An equity of redemption is considered as an estate in the land, and may be devised or granted, and a husband may be tenant by the curtesy of it. In equity, the person entitled to the redemption is considered as the owner of the land; a mortgage in fee is considered as personal assets, and a foreclosure is considered as a new purchase of the land. Until foreclosure, the mortgagee is a trustee to the mortgagor, as to the inheritance. *Casbourne v. Scarfe and Inglis*, 1 Atk. 603, 605.

If an advowson be mortgaged, and is absolute in the mortgagee, and the living becomes void, (vacant,) the mortgagee is entitled to present, he having the legal estate; but a court of equity will compel him to present such person as the mortgagor shall nominate. And the reason given is, that a presentation is gratuitous, and the mortgagee cannot account for any benefit from it, nor give any credit for it in account, upon a redemption. *Croft v. Powell*, Comyn's Rep. 609.

So in the case of *Amhurst v. Dawling*, 2 Vern. 401, pending a bill to foreclose the mortgage of a manor, to which an advow-

son was appendant; the church having become void, the court granted an injunction in favor of the defendant, the mortgagor, to stay proceedings at law in a *quare impedit*, brought against him by the mortgagee. "For," says the court, "the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee, therefore, in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor."

So also in *McKenzie v. Robinson*, 3 Atk. 559, Lord Chancellor Hardwicke was of opinion that the mortgagor of a naked advowson ought to nominate; and even doubted whether, if there were an express covenant in the mortgage that the mortgagee should present, it would not be void; and adjourned the case for further consideration. When the case came on again, "The mortgagee not being able to find any precedent in his favor, gave up the point of presenting; and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee."

And in the case of *Jory v. Cox*, Pr. Ch. 71, "The defendant was a mortgagee, and in possession; the plaintiff brought a bill to redeem, and had a decree accordingly. Before the account taken the church became void, and the mortgagee presented. Upon the plaintiff's petition, the chancellor ordered that he should revoke his presentation, and present such a person as the mortgagor, or his vendee, (for he had contracted to sell,) should appoint."

These authorities all show, that, until actual foreclosure or sale, the mortgagor is, in equity, considered as the owner of the property, and entitled to exercise all the rights which are not incompatible with the object of the mortgage, (the security of the debt,) unless restrained by the express terms of the mortgage.

The analogy between the elective franchise and an advowson is very strong. The exercise of neither of those rights can contribute to the discharge of the debt, or diminish the security. The exercise of them, by the mortgagor, is not incompatible with the object of the mortgage. There seems to be no reason why a court of equity should not give the right of election to the mortgagor of the stock, as well as the right of presentation to the mortgagor of the advowson. And, in accordance with this idea, the British statute of 7 & 8 W. 3, c. 25, § 7, following the rule of equity, prohibits the mortgagee of the freehold, who is not in possession and receiving the rents and profits, from voting for members of parliament, and gives it to the mortgagor; and thus converts the equitable into a legal franchise.

It is suggested, in the answer, that the Bank of Alexandria (the creditor) is interested in the value of the stock, which depends very much upon the proper management of the business of the insurance company; and, therefore, they have a right to vote at the election. But the answer to this argument is, that the plaintiff is as much; and, if the stock is worth more than the debt, is more interested in the good management of the company than the creditor. The reason for and against his having the right to vote being, in this respect, equally strong, the general principle of equity must prevail, — that the mortgagor is to be considered as the owner of the mortgaged property, until foreclosure or sale.

We are, therefore, of opinion that the defendant should be ordered to give the plaintiff a power of attorney to vote upon the stock, until it shall be sold under the mortgage, or deed of trust.

Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1829, AT WASHINGTON.

H. HUNT v. R. SMITH.

A vendor of a city lot in August, is not liable to the vendee for taxes for that year, not assessed until November, and not payable until the first of January following.

THE plaintiff purchased city lots of the defendant in August, 1827, and afterwards was obliged to pay the city taxes for the year 1827. These taxes were not assessed until November, 1827, and were not payable until the 1st of January, 1828.

This suit was brought to recover the amount of those taxes from the defendant, the vendor; but

The COURT (THRUSTON, J., absent,) decided that he was not liable. *Non-pros.*

UNITED STATES v. JOHN STROTHER.

Upon an indictment for a nuisance, in keeping a public gaming-house, the question, Who dealt the cards? is too general. Witness not bound to answer it.

INDICTMENT for a nuisance, in keeping a common gaming-house.

Mr. Swann, for the United States, asked the witness, O. Carr, "Who dealt the cards?"

Mr. Jones, for the defendant, objected that it was too general. And the COURT (*nem. con.*) sustained the objection.

BANK OF COLUMBIA v. BAKER AND DAWES.

An order for an execution, by the president of the Bank of Columbia, under the fourteenth section of its charter, is not a judgment, and a second execution cannot be issued without a new order.

The execution is but the commencement of the suit, and, if not prosecuted, it is discontinued.

SCIRE FACIAS, to show cause why execution should not issue on an order of the President of the Bank of Columbia, made in December, 1825, returnable to May term, 1826, which was never delivered to the marshal, but remained in or was returned to the clerk's office, by the cashier of the bank.

At May term, 1826, a new *fi. fa.* was issued, and ordered, by the plaintiffs, "to lie in the office."

The present *scire facias* was issued on the 27th of April, 1829, returnable to this term.

Mr. Redin, for the defendant, moved the Court to quash the *scire facias*. The order of the president of the bank is not a judgment. It is a mere statutory remedy, and a *scire facias* is not given by the statute. The execution is only the commencement of the suit. The *scire facias* has not been served. The defendant has had no notice. How can he plead? What can he plead? What would be the effect of an order of this Court for an execution? Could the defendant plead to it as he might have pleaded to the first execution? By the fourteenth section of the charter, which authorizes an execution upon the order of the president of the bank, without a previous judgment, the execution must be made returnable to the court which "shall first sit after the issuing thereof." Five years have now elapsed since the order was made. That order was satisfied by the execution issued by the clerk. No new execution can issue without a new order, and upon a new affidavit, stating that the debt is now due. From the neglect to serve the former execution, a presumption arises that the debt has been paid.

Mr. Lear, contra. By the fourteenth section of the charter, (see Maryland Laws, 1793, c. 30, § 14,) it is enacted that the execution issued upon the order of the president of the bank "shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court."

A *scire facias* is only a notice, or rule to show cause; and, by the Stat. of West. 2, (13 Ed. 1, c. 45,) it is given after the year and day "upon those things which are found enrolled before" the justices, "whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever enrolled, wherein the King's Court, without offence of the law and custom, may execute their authority."

The order of the president of the bank is a matter of record, and is to be considered as enrolled; and it is a thing wherein the

Moore v. Ringgold.

Court, without offence of the law and custom, may execute their authority. It is, therefore, a process lawfully issued, and cannot be quashed on motion.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent, but assenting.)

The Court is of opinion that, under the circumstances of this case, the clerk could not issue a new execution without a new order; which new order must be in writing, and accompanied by the same evidence as the first. The execution is but the commencement of the suit, which, if not prosecuted, is discontinued, and must be commenced afresh.

The charter of the bank does not make the order of the president a judgment of the Court, nor give it any other quality of a judgment than that it is an authority to the clerk to issue an execution. It does not say that the order of the president shall be as valid and effectual as a judgment of the Court; but only that the execution "shall be as valid and effectual" "as if the same had issued on judgment regularly obtained."

We are, therefore, of opinion that the *scire facias* must be quashed.

Scire facias quashed, without costs.

MOORE v. RINGGOLD.

A bill of sale of goods is void as to creditors, unless the possession accompanies and follows the deed.

REPLEVIN of a horse taken by the defendant, as marshal, in execution against Dunning, and found in his possession.

The plaintiff claimed the property under a sale from Dunning, who testified that he sent the horse to Moore, with a bill of sale; that Moore sent him back to Dunning with the bill of sale, saying that as he had no other horse, he might keep him till he (Moore) should send for him.

The COURT, (*nem. con.*) upon the authority of the case of *Hamilton v. Russell*, 1 Cranch, 309, instructed the jury that the sale was void as to creditors, unless the possession accompanied and followed the bill of sale.

Verdict for the defendant.

King v. Fearson.

UNITED STATES v. HUGH KIERMAN.

Cocking and raising a gun and threatening to shoot a person is an assault in law, although there should be no attempt to shoot or injure the person.

INDICTMENT for an assault, by cocking a gun and threatening to shoot Henry Jackson.

Mr. Coxe, for the defendant, prayed the Court to instruct the jury that it was not an assault in law, unless there was an attempt to shoot or injure the witness.

The COURT (*nem. con.*) said that if, under all the circumstances, the act indicated an intention to shoot or injure the witness, it was an assault, although the attempt was not actually made.

KING v. FEARSON.

Before a witness can be admitted to testify upon affirmation instead of an oath, the Court must be satisfied that he is one of a society who profess to be conscientiously scrupulous of taking an oath.

If the witness is considered by the Society of Quakers as a member of that society in principle and religious profession, and usually meets with them for religious worship, and has applied to be admitted to a full participation of all the civil privileges and the moral discipline of the society, he may be permitted to testify upon solemn affirmation instead of an oath.

ASSUMPSIT for use and occupation.

Mr. Daniel Kurtz, being offered as a witness, upon his solemn affirmation, stated that he agrees in principles with the Society of Quakers; has applied to be admitted as a member of the society of Friends, who have the matter under consideration; and that he has done all in his power to be admitted.

Mr. Coxe, for the defendant, objects, that the witness is not within the words of the Act of Maryland of 1797, c. 118, nor of the Bill of Rights, § 36. He is not "one of the people called Quakers."

Mr. Lear and *Mr. Dunlop*, *contrà*.

The witness is within the spirit of the Constitution of Maryland, and of the Act of 1797.

Mr. Coxe in reply.

This Court, in the case of the *Bank of Columbia v. Wright*, at December term, 1827, [*ante*, 216,] decided that they were bound by the decisions of the Maryland courts upon this subject; and that the witness must be one of a society who profess to be conscientiously scrupulous of taking an oath.

The question is, Is he a member of the Society of Quakers?

King v. Fearson.

THE COURT (CRANCH, C. J., *contra*,) refused to permit Mr. Kurtz to testify, unless upon oath.

THRUSTON, J., and MORSELL, J., were understood to be of opinion that an affirmation, instead of an oath, cannot be admitted, unless the witness be a member of the society according to its rules — an acknowledged member.

Doctor Little, a Quaker, being affirmed, stated that Mr. Kurtz was considered as a member of the Society of Friends, in principle and religious profession; usually met with them for religious worship, and would not be excluded from their meetings for discipline; has applied to be admitted to a full participation of all the civil privileges and the moral discipline of the society; and has no reason to doubt that he will be admitted, no objection having been made. But the subject is pending before the society; and he is not yet considered as a member in regard to civil privileges and moral discipline.

Upon this evidence the COURT (*nem. con.*) permitted Mr. Kurtz to testify upon his solemn affirmation.

CRANCH, C. J., was of opinion that the Constitution of Maryland ought to have a liberal construction. That the professed object of the provision was to prevent oppression upon the consciences of men; and that the three cases of Quakers, Tunkers, and Menonists, were rather put by way of example, than as confining the privilege to those sects only, and leaving all other cases of conscience to the severe operation of the law. That every other case of really conscientious scruples was within the meaning of the law; the only question being as to the fact of conscientious scruples, or the membership of the witness in relation to his religious scruples; and not in relation to the discipline or civil privileges attached to membership. So that a member of a society, in regard to its religious persuasion upon the point of the unlawfulness of oaths, was within the protection of the Constitution, although he should not be a member as to its civil privileges according to the rules of the society, nor subject to its moral discipline.¹

¹ By the 33d section of the Declaration of Rights affixed to the Constitution of Maryland, it is declared that "no person ought, by any law, to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless under color of religion any man shall disturb the good order, peace, and safety of the State," &c. *Quære*, Is not a law which disqualifies a man to be a witness or juror, or to obtain an attachment, or injunction, or security of the peace, &c. on account of his religious persuasions or profession, in contravention of this section of the Declaration of Rights? The 36th section declares, "That the manner of administering an oath to any person ought to be such as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most

HYER AND BURDETT v. J. C. R. SMITH.

An acknowledgment to the plaintiff's counsel, by the indorser, that he indorsed a draft drawn by the defendant, which was not then shown to him, is *prima facie* evidence of his indorsement, in a suit against the drawer, and throws the burden of proof on the defendant, to show that there were other drafts drawn by the defendant and indorsed by the same indorser. The declaration averred that the draft was indorsed to the plaintiffs, who were stated to be Hyer and Burdett, "survivors of Bremner." The indorsement, which was in full, was, "to the order of Messrs. Hyers, Bremner, and Burdett." Held, that such an indorsement did not support the declaration.

If, upon leave to amend, the plaintiff add a count upon a cause of action which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged.

ASSUMPSIT against the drawer of a draft upon M. S. C. Clarke, indorsed to Hyers, Bremner, and Burdett.

The plaintiffs, having proved the handwriting of the defendant, offered to prove by Mr. Barrell, one of the plaintiffs' counsel, that Mr. Black, the indorser, in conversation with him about this draft, which was then in Mr. Barrell's possession, but which Mr. Barrell did not show to Mr. Black, admitted that he had indorsed the draft.

Mr. Coxe and *Mr. Hall*, for the defendant, objected that such an admission by Mr. Black was not competent evidence of his indorsement, and cited *Chitty*, 498.

Mr. Barrell, contra, cited *Maddocks v. Hankey*, 2 Esp. Rep. 647; 4 Petersdorff, 550, Ed. 1826; *Chitty*, 289, 311.

effectual confirmation, by the attestation of the Divine Being. And that the people called Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed," &c. "and further that on such affirmation, warrants to search for stolen goods, or the apprehension or commitment of offenders, ought to be granted, or security for the peace awarded; and Quakers, Tunkers, and Menonists ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses in all criminal cases not capital." See also the Act of 1797, c. 118, "to alter such parts of the Declaration of Rights, the constitution and form of government, as prevent persons conscientiously scrupulous of taking an oath from being witnesses in all cases;" which recites, "Whereas persons conscientiously scrupulous of taking an oath, labor under many and great inconveniences, owing to their not being admitted to make their solemn affirmation as witnesses in all cases, instead of an oath: Therefore it is enacted, &c., that the people called Quakers, those called Nicolites, or New Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, shall be allowed to make solemn affirmation as witnesses, in the manner," &c. which "shall be of the same avail as an oath to all intents and purposes whatever." And by the 3d section it is enacted, "that before any of the persons aforesaid shall be admitted as a witness in any court of justice in this State, the court shall be satisfied by such testimony as they may require that such person is one of those who profess to be conscientiously scrupulous of taking an oath."

Mr. Coxe cited *Hemings v. Robertson*, Barnes, 436; *Chitty*, 497; *Bayley on Bills*, 322; *Gray v. Palmer*, 1 Esp. Rep. 125; 4 Bac. Ab., Merchant, M. 739; *Starkie on Ev.* part 4, p. 249.

CRANCH, C. J., was of opinion that as the draft was not shown to Mr. Black, his admission that he indorsed a draft of Mr. Smith on Mr. Clarke, was not sufficient proof of his indorsement of the draft now produced.

But the COURT thought the indorsement sufficiently proved to throw the burden of proof on the other side, to show that there was another draft of Smith's indorsed by Black.

Mr. Coxe, for the defendant, then objected to the admission of the draft in evidence, because the declaration avers that it was indorsed to the plaintiffs, and the plaintiffs are averred to be Hyer and Burdett, "survivors of Bremner;" but the indorsement, which is in full, is, "Pay to the order of Messrs. Hyers, Bremner, and Burdett." 1 Com. Dig. p. 53, § 12, tit. Abatement, E. 12.

Mr. Barrell, *contra*, cited 1 *Chitty on Pleading*, 6, 12.

Mr. Hall, in reply, cited *Webber v. Tyvill*, 2 Saund. 121.

The COURT (THRUSTON, J., absent,) was of opinion that the indorsement offered in evidence did not correspond with the averment, and could not be admitted in evidence to the jury upon that declaration.

A juror was then withdrawn, and the plaintiffs had leave to amend, upon payment of the costs of the term.

The plaintiffs then amended their declaration, which contained only the common money counts, by adding a count upon the bill of exchange.

Mr. Coxe then moved the Court to exonerate the bail, on the ground that the new count introduced a new cause of action, upon which the plaintiff could not have recovered upon the old declaration; and cited the Maryland Act of 1715, c. 46, § 3; *Garibaldo v. Cagnoni*, 6 Mod. 266; *Kerr v. Sheriff*, 2 B. & P. 358; 1 Petersdorff, 396; 3 Petersdorff, 289, 291.

CRANCH, C. J., after stating the facts and authorities cited, delivered the opinion of the Court (*nem. con.*) as follows:

Upon consideration of these cases, the Court is clearly of opinion that if the plaintiff amends his declaration by adding a count upon a cause of action, which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged.

Bail discharged.

SEMMEs v. LEE.

If one of the counts be "for matters properly chargeable in account, according to an account therewith filed," according to the Maryland practice; and there be no account filed, and *non assumpsit* be pleaded to all the counts, the plaintiff may give evidence upon that count; the defendant by his plea having waived the objection to the same.

INDEBITATUS ASSUMPSIT, 1st, for matters properly chargeable in account, "as by a particular account thereof, herewith into court exhibited, appears;" but no account was therewith exhibited. 2d. General *indebitatus assumpsit* for goods, wares, and merchandise sold and delivered. 3d. *Quantum meruit* for goods, &c. sold and delivered. 4th. The common money counts; and 5th. *Insimul computasset*.

The plaintiff offered evidence that the defendant boarded and lodged at the plaintiff's house six months.

The defendant objected that that evidence did not support either of the counts. And of that opinion was the COURT, (MORSELL, J., dissenting.)

The plaintiff then offered an account in evidence, and proved that it had been for a considerable time in the defendant's possession, and that in a conversation between the witness and the defendant, he did not object to the items of the account, except that he was charged daily board for part of the time, when he ought to have been charged for yearly board only; and that the prices were too high.

Mr. Redin, for the plaintiff, contended that this account was evidence upon the *insimul computasset*, and on the count for goods sold and delivered, and upon the count for matters properly chargeable in account.

The COURT (*nem. con.*) was of opinion that it did not support the count upon *insimul computasset*, but that it was evidence upon the count for goods sold and delivered, so far as it consisted of charges of that kind; and also (CRANCH, C. J., *contra*,) that it was evidence upon the first count for matters properly chargeable in account.

CRANCH, C. J., was of opinion that no evidence could be admitted upon the first count, because it was an imperfect count,—the matters chargeable in account not being in any manner specified,—no account having been exhibited with the declaration; and that it was not competent for the plaintiff to supply the defect after the jury was sworn.

MORSELL, J., was of opinion that the objection to the first count came too late. It ought to have been taken advantage of

Farmers and Mechanics Bank v. Gaither.

by demurrer; and that the plea of *non assumpsit*, being general to all the counts, the objection was to be considered as waived; and that it was competent to the plaintiff to give, under that count, evidence of any matter properly chargeable in an account. And that to the objection of surprise, for want of notice, it was a sufficient answer to say, that the account now offered in evidence was delivered to the defendant, and remained some time in his possession.

Verdict for the plaintiff. A motion for a new trial was made and overruled; the Court being of opinion that substantial justice had been done.

FARMERS AND MECHANICS BANK OF GEORGETOWN v. GEORGE
R. GAITHER.

If a bank discount a note for the indorser at six per cent., and give post-notes, having time to run and not bearing interest, the transaction is usurious, and the bank cannot recover upon the note through such an usurious indorsement, although the note itself, when given, was free from usury.

THIS cause now came before this Court upon the *venire de novo* awarded, in pursuance of the mandate of the Supreme Court, at January term, 1828, (see 1 Peters, 37); and, in the course of the trial, (MORSELL, J., not sitting,) this COURT, at the prayer of *Mr. Key*, for the defendant, instructed the jury, in effect, that if they should be satisfied, by the evidence, that the defendant's note, upon which this suit was brought, was indorsed to the plaintiffs by W. W. Corcoran & Co., as collateral security for their note, discounted by the plaintiffs, at the usual rate of six per cent. per annum, under an agreement that they should take therefor post-notes, not bearing interest, and having time to run, without any rebate upon such post-notes for such time; then the plaintiff is not entitled to recover in this action.

Whereupon *Mr. Coxe*, for the plaintiffs, prayed the Court to instruct the jury, that if they should be satisfied by the evidence, that on the 30th of June, 1823, Thomas Corcoran substituted his notes for those of W. W. Corcoran & Co., and they were no longer the debtors of the bank, and that this suit was originally brought at the instance and for the sole use of Thomas Corcoran, then the circumstances stated in the foregoing opinion of the Court are not sufficient to prevent the plaintiffs from recovering in this cause for the use of the said Thomas Corcoran. *Mr. Coxe* cited *Parr v. Eliason*, 1 East, 92.

But the COURT refused to give such instruction.

Mr. Key cited *Chitty*, 104.

The Court also rejected the set-off of the notes of W. W. Corcoran & Co., which were offered under the circumstances stated in this case before the Supreme Court. 1 Peters, 37.

Verdict for the defendant. Bills of exceptions were taken, but no new writ of error prosecuted.

UNITED STATES v. TOBIAS WATKINS.

The Circuit Court of the District of Columbia for the county of Washington has jurisdiction of an offence committed in that county against the common law of Maryland, adopted as the law of the United States for that county, by the Act of Congress of February 27, 1801, although that offence may consist in the fraudulently obtaining of the money of the United States, by an officer of the United States, by means of false pretences.

By the cession of this part of the district to the United States by Maryland, all the State prerogative which Maryland enjoyed under the common law which she had adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, as to this district, became vested in the United States. The United States, therefore, have a criminal common-law jurisdiction in this part of the district, and this Court has a criminal common-law jurisdiction.

Frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment; although the fraud be not effected by means of false public tokens, or by forgery, or conspiracy, or by any particular sort of means.

The principle which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by tokens, or false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public. All frauds affecting the public at large, or an indefinite number of persons who have suffered a common or joint damage, by reason of the fraud, are indictable offences at common law.

Every indictment must be "certain to a certain intent in general."

Money lawfully in the hands of an officer of the United States, and for which he is accountable, is money of the United States, and may be so charged in an indictment.

An indictment charging fraud ought to aver the means by which the fraud was effected.

In an indictment for obtaining money by false pretences, the averment must state what was pretended, and that what was pretended was false; and wherein and in what particular it was false.

An indictment averring that the defendant, "ostensibly for the public service, but falsely and without authority, caused and procured to be issued from the Navy Department of the United States" a certain requisition, set forth in the indictment, cannot be supported as an indictment for forgery.

An indictment for obtaining money by false pretences, one of which is stated to be an erasure in an account rendered to the defendant, cannot be supported as an indictment for forgery.

Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constitute the fraud. Whether an act be done fraudulently or not, is a question of law, so far as the moral character of the act is involved. To aver that an act was fraudulently done is, therefore, so far as the moral character of the act is involved, to aver a matter of law, and not a matter of fact. An averment that an

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- act was done with intent to commit a fraud, is equivalent to an averment that it was done fraudulently.
- No epithet, or averment of a fraudulent intent, can supply the place of an averment of the fact, or facts, from which the legal inference of fraud is to be drawn.
- Deceit is an essential ingredient in fraud. No fraud can be committed but by deceitful practices; and the particular deceitful practices, by which the fraud is alleged to have been committed, must be specially set forth, so that the deceit may appear upon the face of the indictment, that the Court may judge whether the fraud, which constitutes the crime, can be inferred from the facts stated in the indictment.
- An indictment is not a good indictment, at common law, for forgery by erasure, unless it use the technical term, "forge or counterfeit."
- The Court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the Court may, perhaps, be bound to give it, if it be such an instruction as can be given without committing the Court upon points which might come before them, to be decided on the trial in chief.
- When an instruction to the grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the Court to give the instruction or not, considering the extent of the prayer, and all the circumstances under which it is asked.
- If an officer of the government of the United States, not intrusted with public money, get it into his hands by fraud, and appropriate it to his own use, the offence is not an official misdemeanor, but is an offence at common law.
- A count, describing the deceptive means by which the defendant procured the placing of public money in the hands of a navy agent, and also the means by which the defendant got the money into his own hands, for his own use, from that agent, does not charge two separate offences.
- If one necessary link in the chain of means to accomplish the fraud, was obtained by deceptive practices, those deceptive practices are as effectual in constituting the offence as if every other link in the chain had been forged by the like deception. The deceitful practices, used in obtaining one of the means of effecting the fraud, infect the whole transaction.
- If a person in Washington, D. C., by deceitful practices, causes money of the United States to be placed to his credit in New York, and subject to his draft; and he draws, accordingly, in Washington, and there gets the draft discounted by a broker, and there receives the proceeds of the draft, the fraud is consummated in Washington, if the drawee honors and pays the draft, and thereby ratifies the act of the broker, in advancing the money; but until the draft is paid the offence is not complete.
- The time of finding the indictment will appear by the caption, when the record is made up; and, upon demurrer, the judgment must be upon the whole record; and if upon the whole record it should appear to the Court that the offence was committed beyond the time limited, judgment must be rendered for the defendant.
- The defendant has a right, upon demurrer, to avail himself of the statute of limitations.
- The limitation of two years, in the Act of April 30, 1790, is applicable to common-law offences in the District of Columbia.
- The Court may, in a criminal case, suffer the defendant to withdraw his demurrer to the indictment, after argument, and after the Court has intimated an opinion that it ought to be overruled, and before judgment entered upon the demurrer.
- Although a judgment against the defendant upon demurrer, in a case of misdemeanor, is peremptory, yet it is not so if against the United States; for they may send up new bills of indictment, successively, until they have made their case perfect in form.
- Upon suffering a defendant to withdraw his demurrer, after argument, and after an intimation of the opinion of the Court, they may require him to waive his right to move in arrest of judgment for any matter apparent upon the indictment.
- A party cannot discredit his own witness by testimony as to his general character, but may give evidence to contradict any important fact to which the witness has testified. A fact is not immaterial if it shows that the party prevaricated in relation to a fact in issue.

United States v. Watkins.

If the jury bring in a verdict, not answering to the whole matter in issue, the Court, without recording it, will inform the jury that they may retire again and reconsider their verdict. If they return a verdict to which neither party objects, it will be recorded.

It is no legal objection to a juror that he had been one of the jury in another cause against the same defendant for a different offence; and it seems that the Court has no authority to order talesmen to be sworn until the regular panel has been exhausted; and the names of all the attending jurors will be put into the box, and twelve drawn by lot by the clerk. The juror, when called up to be sworn, may be asked whether he has "formed and expressed an opinion upon the guilt or innocence of the defendant upon the indictment in this case;" and before the question is put, the indictment may be read by the clerk in the hearing of all the jurors attending the Court. If the question be answered in the negative, the juror may still be challenged for cause; and if challenged for favor, the challenge will be tried by two triors, (appointed by the Court,) who are to be sworn upon each challenge; and if they cannot agree, the challenge is not supported, and the juror must be sworn.

After a juror is sworn, he cannot be challenged; and the Court cannot discharge him without the consent of the parties, although he should state to the Court matters which would be proper evidence upon a challenge for favor.

When a tales is returned, the parties have a right to challenge any of the original panel already sworn in chief, but it must be for a cause arising after the juror was sworn.

The Circuit Court of the District of Columbia, has jurisdiction of any common law offence committed in the County of Washington, by an officer of the government of the United States, of which it would have jurisdiction if committed by a person not an officer of the United States, although such offence should have been committed by means consisting in part of acts done by virtue, or by color, of his office.

After the jury has been out a long time without any probability of agreeing, the Court may, in a case of misdemeanor, discharge them without the consent of the defendant.

If a verdict is so imperfect that no judgment can be given upon it, it must be considered as no verdict; the defendant has not been in jeopardy, and a *venire de novo* must be awarded.

The recording of a verdict does not prevent the Court from deciding that it is so imperfect as not to justify a judgment.

A verdict which finds only one or two, out of many facts which are all necessary to constitute the offence, and saying nothing of the residue, is not a "partial" verdict in the technical sense of those words.

If the jury do not find a general verdict, nor a partial verdict, nor a special verdict, they find no verdict.

A verdict, in a criminal case, finding a fact which, if specially pleaded, would be a good defence, is to be considered, and entered, as a general verdict; so also, if it find a fact inconsistent with the guilt of the defendant; but it is otherwise when the facts found neither establish nor are inconsistent with the guilt or the innocence of the defendant.

Upon the trial of an indictment for a fraud at common law upon the United States, by an officer of the United States, in getting into his own hands and appropriating to his own use, money of the United States, which he had no right or authority to receive, the fact that he obtained the money in his official capacity is immaterial.

The Court refused to instruct the Grand Jury that a certain paper, intended to be offered in evidence to them by the attorney for the United States, was such a paper as could be the subject of forgery at common law, and that certain specified facts and intents amounted to forgery at common law; and that if they found those facts and intents, they ought to find the bill, although it contained the word "forged."

Counsel are not permitted to argue to the jury the question of law which has been by both parties, submitted to the Court, and by them decided, and the jury instructed thereupon.

The only way in which a jury can decide the law of a case is by finding a general verdict.

If the instruction given exceed the matter submitted to the Court, and involve ques-

tions of law not involved in the instruction prayed, the counsel will be permitted to argue, before the jury, the questions of law not involved in the instruction asked and submitted to the Court; and if the opposite counsel withdraw their prayer, the Court will withdraw its instruction, and leave the question of law to be argued before the jury, reserving the right of the Court to instruct the jury on the questions of law after the close of the argument to the jury.

Although the 4th auditor had no authority by law, to direct the disposition of the money of the United States in the hands of a navy agent, the payments, by the latter, of the drafts of the former, were not, necessarily, payments, in his own wrong. If the 4th auditor had such authority, the navy agent might, under possible circumstances, be excused for paying his drafts not officially drawn; and such drafts and payments might be a fraud on the United States. The fact, that the government has credited the navy agent for such payments, and charged the same to the drawer, does not exculpate him. The fact, that the money drawn for was ultimately paid by the navy agent in New York or Boston, does not prevent the Circuit Court of the District of Columbia from having jurisdiction of the cause, if the defendant received the money in Washington by a discount of the draft.

If the official character of an officer of the United States be not a necessary ingredient of the offence charged in the indictment, the naming him as such, and the averment that he was such an officer, will not prevent a court of law from taking cognizance of the offence.

THE defendant in this case was arrested on the 1st of May, 1829, in Philadelphia, by a warrant issued at the instance of the United States, upon an affidavit made before a justice of the peace in Washington, D. C., by Mr. Amos Kendall, who, on the 23d of March, 1829, was appointed to the office of 4th auditor in the place of the defendant, who was sent for trial to Washington, by a warrant issued by Judge Hopkinson, under the 33d section of the Judiciary Act of 1789.

In the progress of the cause a number of indictments were successively found by the grand jury, and were, in some instances, so blended in argument, that the whole may be considered as one cause and one prosecution.

It came before the Court first upon demurrer to two indictments. The first count in the first indictment stated, "That Tobias Watkins, late of Washington County, gentleman, on the 5th of July, 1827, at Washington County, being then and there the fourth auditor of the Treasury of the United States, and being an evil-disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use, divers sums of money of the United States, with force and arms, at, &c., on, &c., falsely and fraudulently, wrote and addressed, and caused to be sent to a certain J. K. Paulding, then a navy agent of the United States, at the city of New York, a letter in the words and figures following, to wit:

" Treasury Department, 4th Auditor's Office, 5th July, 1827. Sir, You will receive by the mail of to-morrow, or next day, the Treasurer's draft for \$500, five hundred dollars, under the appro-

priation for 'arrearages,' in order to meet my draft on you of this date, for that sum. That time might be given for the remittance of the draft, my order is made payable at three days' sight, and will be charged, when paid, to 'arrearages.' It is in favor of S. and M. Allen & Co. I am, Sir, very respectfully, your ob'dt. servant, T. Watkins. J. K. Paulding, Esq., Navy Agent, New York.

"That on the same day the said T. W. made and executed a draft on the said J. K. Paulding, navy agent as aforesaid, according to the advice of the aforesaid letter, in favor of S. & M. Allen & Co., for \$500, at three days' sight, and sold it to C. S. Fowler, and received of him therefor \$500, which he kept and disposed of for his own use."

'That the said T. W. did, on the 6th of July, 1827, "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the Navy Department of the United States, a certain requisition to the Secretary of the Treasury of the United States for the purpose and intent of placing in the hands of the said J. K. Paulding, Navy Agent as aforesaid, the sum of \$1,000 of the moneys of the United States, which requisition is in the words and figures following, to wit," &c., (being in substance a request by Mr. Southard, the Secretary of the Navy to the Secretary of the Treasury to issue a warrant to J. K. P., Navy Agent at New York, for \$1,000, to be charged to him, and to be charged to the appropriation for "arrearages prior to 1827," dated July 6, 1827.)

"By means of which requisition, the said sum of \$1,000 of the moneys of the United States, was placed in the hands of the said J. K. Paulding.

"That the said T. W. on the 9th of July, 1827, wrote and addressed, and caused to be sent to the said J. K. Paulding, a letter in the words and figures following, namely, (in substance, that instead of \$500 he would receive \$1,000 under the appropriation for the payment of 'arrearages,') and on the 25th of July, 1827, drew again on J. K. P. for \$500, and sold the draft to Fowler for \$500, which he, (T. W.) kept and disposed of for his own use, and wrote another letter of advice of that date to J. K. P., and directed him to charge it to 'arrearages.'

"That the said letters and drafts so as aforesaid written and sent and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, drawn, and sold, and caused and procured to be issued without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud

the said United States, and as false pretences to enable him to obtain to his own use and benefit, the said two sums of \$500 each; and that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of \$500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The second count in the same indictment charges a similar transaction to the amount of \$750 in January, 1828, and contains an additional averment, that the draft on J. K. P., in this count mentioned, was paid by him; and that the requisition was procured by the said T. W. "ostensibly for the public service, but falsely and without authority" for \$12,889.12, exceeding the sum for which J. K. P. had asked a requisition by the sum of \$750; "which sum of \$750 was by the false suggestion and procurement of the said Tobias Watkins, added to the amount required by the said Paulding, for the purpose and intent of placing in the hands of said J. K. Paulding, navy agent as aforesaid, the said sum of \$750 of the moneys of the United States, to meet the payment of the said draft so made and sold as aforesaid to the said C. S. Fowler, which requisition is in the words and figures following, to wit," &c.

The averment of false pretences is exactly like that in the former count.

The second indictment charged a similar transaction with Mr. Harris, a navy agent in Boston, to the amount of \$2,000, with similar averments, and that the drafts were paid by Mr. Harris. Two of the drafts were in favor of Thomas Pottinger, and there is an averment that the indorsements of the name of Pottinger were either genuine, for the accommodation of the said Tobias Watkins, or were falsely made by the said Watkins.

There is also an averment that Mr. Harris sent his regular quarterly abstract of expenditures, (containing three charges of three drafts of Watkins,) to the said T. W. as 4th Auditor, "who was the proper officer to receive the same; and that the said Watkins, having received the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the United States, and to consummate his said fraud, and to cover and conceal the same, that he might thereby be enabled to keep to his own use the moneys he had obtained by means of the said drafts, and thereby to defraud the United States, did afterwards, to wit," &c. "falsely and fraudulently alter the said abstract by erasing therefrom the words, 'T. Watkins,' 'Draft,' 'Do. of 500,' 'Do. Do. ', opposite to the dates September 1st,

10th, and 20th, prefixed to the aforesaid three items in the said abstract, under the head of 'arrearages prior to 1827,' hereinbefore set out, with intent to defraud the United States."

"And the said letters and drafts, so as aforesaid written and sent and drawn and sold and paid as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said T. W., and that the same were made and done and procured, and also the erasure of the said abstract made and done, with intent to defraud the said United States, and as false pretences, to enable him to obtain and keep to his own use and benefit," &c. &c. as at the conclusion of the first indictment.

Mr. Jones, for the defendant, contended that the indictments did not charge any common-law offence. The offence, at most, is the misapplication of public funds to his own use — nothing worse than speculation. At the worst, he is only a public defaulter. The obtaining of money by false pretences, at common law, must be by some means which are likely to affect the public; such as false weights — means which common prudence cannot guard against — means in which the public have a right to place confidence — public false tokens.

Nor is it sufficient that the fraud should affect the public.

But if false pretences are relied upon, they must be distinctly averred. The pretence must be set out, and averred to be false. These indictments do not set out any pretence that is averred to be false.

Mr. Jones cited *The King v. Lara*, Leach, 746; S. C. 6 T. R. 565; *Rex v. Wheatly*, 2 Burr. 1125; S. C., Leach, 818; S. C., W. Bl. 273; *Rex v. Dunnage*, 2 Burr. 1130; *Rex v. Osborn*, 3 Burr. 1697; *Rex v. Channel*, 2 Str. 793; *Rex v. Bryan*, 2 Str. 866; *Rex v. Bower*, Cowp. 323; East, P. C. 820; *Regina v. Mackarty*, 2 Ld. Raym. 1179; S. C., Salk. 286; East, P. C. 823; 1 Hawk. c. 23, § 1; 2 Hawk. c. 25, § 57, 59, p. 320, 322; 1 Hawk. c. 30, 28, 29; Russell on Cr. 1362, 1367; *The King v. Mason*, 2 T. R. 581; *Rex v. Perrott*, 2 M. & S. 379.

Mr. Coxe, on the same side, contended that this is a charge of an offence against the United States in their national character; and in that character they have no criminal common law; there are no criminal common-law offences against the United States; and this Court has no jurisdiction of any common-law offence against the United States in its national character. Our common law here is only the common law as it existed in Maryland

on the 27th of February, 1801, when it was adopted as the law of this part of the District. At that time no State court in Maryland could have tried such a case as this, because it is a case of purely federal jurisdiction, it being an offence against the United States in its federal character; and no court of the United States would have had cognizance of the cause, because the United States courts have no common-law criminal jurisdiction. This Court has only the jurisdiction of the Circuit Courts of the United States, and of the State courts in Maryland; and as neither of them could have had jurisdiction of this case, this Court has not.

Mr. Coxe cited, upon this point, 6 Dane, Ab. 752; 1 Kent, Lecture 16, p. 311, 312, 320, 378; *United States v. Coolidge*, 1 Wheat. 415; *United States v. Coolidge*, 1 Gall. 488; Sergeant's Const. Law; *Warrals's case*, 2 Dal. 384, 393; *United States v. Hudson and Goodwin*, 7 Cranch, 32; Duponceau on Jurisdiction; *Burr's Trial*, cited in Kent's Commentaries.

But the charge in the indictment is not of an offence at common law. It contains no averment of false pretences. It is not sufficient that it is a fraud upon the government. It must be a fraud committed by means which affect the public. It is not sufficient that the fraud which is the effect of those means should affect the public. East, P. C. 816, 817, § 2; Russell, 1370; 3 Chitty, 421, 425; 1 Chitty, Cr. L. 154, 159, 230.

The second indictment cannot be sustained as an indictment for forgery, as is now suggested by the counsel for the prosecution. The words "falsely forged and counterfeited" are necessary in an indictment for forgery, whether at common law or by statute. East, Cr. L. 985. If it contains two distinct offences, namely, fraud by false pretences, and forgery, it is multifarious, and therefore bad upon demurrer. *Rex v. Perrott*, 2 M. & S. 385.

Fraud on the revenue does not constitute a distinct class of offences.

The question as to common-law offences against the United States in their national character is not a question of jurisdiction; but whether there are such offences. This Court has a common-law criminal jurisdiction in such cases only as were cognizable in the State courts of Maryland. The exclusive legislation over this District is only exclusive of all State legislation. This is a peculiar offence, by an officer of the United States against his government. If this Court can take cognizance of it, every officer of the government may be subjected to trial in the State courts for his official acts.

The money which the defendant obtained was not the money of the United States, but of the navy agent to whom it was charged, and who was accountable for it.

Another objection taken to the second indictment was, that the indorsement of Pottinger is stated alternatively and not positively. 1 Chitty, 159.

The abstract was not such a paper as could be the subject of forgery at common law.

Mr. Swann and *Mr. Key* for the United States.

This Court has all the common-law jurisdiction as to offences against the United States which a court in Maryland, on the 27th of February, 1801, had, as to offences against the State. In regard to offences committed in this District, the United States have a common-law criminal jurisdiction; and all offences against the common law as it existed in Maryland on the 27th February, 1801, committed in this county, are offences against the United States; and this Court exercises both the federal and State jurisdiction. There is not here any distinction between them. It is here all federal jurisdiction.

These indictments are good at common law. They charge that certain things were done as false pretences, and without authority, and with intent to defraud the United States; and that "ostensibly for the public service, but falsely and without authority, he caused to be issued" a certain requisition, &c.

The abstract is a public document, and, as such, is a subject of forgery at common law. If it is not forgery it is fraud.

But this is a fraud upon the public, and needs not the aid of false pretences. All frauds which affect the public at large, or a great number of persons, are indictable. *Russell*, 1360, 1361, 1362; 2 East, Cr. L. 816; *The King v. Wheatly*, 2 Burr. 1125; *Channing's case*, 2 Saunders; *Jones's case*, Salk. 379; *Pinkney's case*, Sayer, 146; *Bryan's case*, 2 Str. 866; *Lara's case*, 6 T. R. 565; *Wilder's case*, 2 Burr. 1128; *Treves's case*, East, Cr. L. 813, 821; *The King v. Southerton*, 6 East, 134, 136; *The King v. Brisac*, 4 East, 164, 172; 1 Russell, 219; *Regina v. Woodward*, 11 Mod. 137; *The King v. Minister, &c. of St. Botolph Bishopsgate*, 1 W. Bl. 443; 3 Chitty, Cr. Pl. 699, 701; *Powell's case*, 1 Dal. 47; *Rex v. Osborn*, 3 Burr. 1697.

The defendant's office of Fourth Auditor did not give him any authority to receive the money, nor make him a trustee.

The indictments may be supported as a fraud upon the public, and effected by false writings.

Fraud affecting the public does not require false tokens, or false pretences. It is a distinct head of indictable offences. 3 Chitty, 700, 701, 995, 1001; East, Cr. L. 824; *Gover's case*,

in Sayer's Rep. ; *Sweers's case*, 1 Dal. 45 ; East, 840, 855, 989.

The second indictment is a good indictment for forgery at common law. The words "forge and counterfeit" are not necessary. *Gover's case*, East, 824 ; 3 Chitty, 978 ; Russell, 1377 ; East, 862.

CRANCH, C. J., delivered the opinion of the Court, as follows, (THRUSTON, J., dissenting.)

The substance of the first indictment is,

That Tobias Watkins, being Fourth Auditor of the Treasury of the United States, and intending fraudulently to obtain, for his own use, money of the United States, falsely and fraudulently wrote a letter to J. K. Paulding, a navy agent of the United States, advising him of his (T. W.'s) draft on him for \$500, to be charged to "arrearages," and that he would receive a treasury draft for the same, to meet it. That T. W. drew such a draft, and sold it to C. S. Fowler for, and received of him, the same amount, and applied it to his own use. That the said T. W. did, ostensibly for the public service, but falsely, and without authority, procure to be issued from the Navy Department a certain requisition to the Secretary of the Treasury, for the purpose of placing in the hands of the said J. K. P., navy agent, the sum of \$1,000 ; which requisition is set out *in verbis*, to be charged to "arrearages prior to 1827 ;" by means of which requisition the said sum of \$1,000 was placed in the hands of the said navy agent. That the said T. W. afterwards wrote another letter to the said navy agent, informing him that the remittance under the appropriation for "arrearages" would be \$1,000 instead of \$500 as before advised, and afterwards drew another draft on him for \$500, which sum he received for it of C. S. Fowler, and applied to his own use ; of which draft he also informed the said navy agent by letter. "That the said letters and drafts so as aforesaid written and sent and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said T. W., and with intent to defraud the said United States, and as false pretences to enable him to obtain to his own use and benefit the said two sums of \$500 each ; and that by means of the said aforesaid, defraud the said United States of the said two sums of \$500 each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

There is another similar count, upon another similar transaction, for \$750, with the like averments.

To this indictment there is a general demurrer and joinder.

By the demurrer the facts are admitted, if they amount to an indictable offence at common law, and are well set forth.

The first ground of demurrer relied upon is, that the United States, as a nation, has no common law, in relation to crimes and offences ; and, consequently, that there can be no common law offences against the United States, in its national character ; that this offence, if it be an offence, is against the United States in that character, and not as the local sovereign of this district ; and, therefore, it is not an indictable offence.

It is said that this Court can only exercise the jurisdiction of federal courts and of the State courts. That the federal courts could not hold jurisdiction of this cause, because it is not a criminal offence against the United States, who have no criminal common law. And that the State courts could not hold jurisdiction of it, because, if it be an offence at all, it is exclusively an offence against the United States.

This argument is certainly, at first view, quite plausible ; but to our minds not entirely satisfactory. Is it clear that this offence is of such an exclusive character, that it could be prosecuted only in a court of the United States ?

If it had been committed in one of the States, say in Maryland, is it clear that it would not have been an offence against that State ? The offence charged, we will say, for the sake of argument, is in substance a cheat ; that is, an act of fraud, done to the injury of the United States.

The State court has jurisdiction of cheats and frauds. Does that jurisdiction depend upon the question, to whose injury the cheat or fraud was committed ? Whether it be to the injury of a citizen of Maryland, or of a foreigner, or of another State, or of a foreign sovereign, or of the United States ? If a fraud to the injury of the State of Pennsylvania should be committed in Maryland, it could not be tried in Pennsylvania ; and shall it be said that it is no crime in Maryland to do an unlawful act to the injury of Pennsylvania ? What is there in the circumstances of the transaction, to make it a case of exclusive federal jurisdiction ? Is it because the defendant is stated to have been Fourth Auditor of the Treasury of the United States ? He is not charged with having done any act in that character, or by color of that office ; nor is he charged with the violation of any official duty, nor with having made use of his office, or official character, to perpetrate the fraud. Is it because the person, upon whom the drafts were drawn, was an officer of the

United States? That circumstance is perfectly immaterial, and cannot change the nature of the transaction. The foundation and substance of the offence is fraud, — moral fraud, — *crimen falsi*; the turpitude of which is neither increased nor diminished by the circumstance, that the draft was drawn by one officer of the United States, and accepted by another, neither of them acting in his official character, nor by virtue of his office. Is it because the fraud was committed by means of a requisition from the Navy Department upon the Treasury of the United States? That circumstance does not alter the nature of the offence; it is still a simple cheat or fraud. Is it because the United States is the sufferer by the fraud? The same answer may be given, — the nature of the offence is not thereby altered.

We are, therefore, of opinion that there is nothing in the character of the parties, or in the circumstances of the transaction, which would make it a case of exclusive federal jurisdiction; but that if it be, in its nature, a common-law offence, and had been committed in a State, it might have been tried in a State court, as an offence against that State. We think, therefore, that if it be a common-law offence, committed in this county, it is within the jurisdiction of this Court, whose common-law jurisdiction is derived from the common law of Maryland, which was, by the cession of Maryland and the acceptance of Congress, under the provision in the Constitution of the United States, transferred from Maryland to the United States, with that remnant of State sovereignty, which, after the adoption of the Federal Constitution, was left to Maryland. All the State prerogative which Maryland enjoyed under the common law, which she adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded.

We therefore think that, in regard to offences committed within this part of the district, the United States have a criminal common law, and that this Court has a criminal common-law jurisdiction.

The next ground of demurrer is, that fraud is not an indictable offence at common law, unless it be effected by means of some false public token, such as false weights, or measures, or marks; or by means which affect the public generally, unless it

be fraud against the king, and the public at large; and, even then, it is not sufficient that the king, or the public at large, is the party injured, but the fraud must be effected by means which are likely to affect the public at large,—means which are generally mischievous, such as adulterating provisions, &c.

But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedents.

1. By principle. Why are any acts made punishable by public prosecution? Because they are acts which, in their nature, are injurious to the public interests. The interests to be protected by the government are, the public peace, the public morals, the public property, and the public justice. Why is theft or robbery an offence against the State? Because they lead to a breach of the peace, to violence and bloodshed, in the protection or the recovery of the property stolen. Why are public lewdness and disorderly houses indictable offences? Because they tend to injure the public morals, they are mischievous to many,—to an indefinite number,—to the public at large.

Why are violations of the public property offences against the State? Because they immediately affect the public interest,—the interest of an indefinite number, who cannot individually complain,—whose separate interest is not injured, but who, collectively only, are sufferers; and who, collectively only, have the right to seek redress. Why are acts which tend to obstruct the due administration of justice indictable offences? Because they are, in their nature, injurious to the public at large; for the due administration of justice is necessary to the protection of all the other great interests of society. To such cases the rule, *vigilantibus non dormientibus jura subveniunt*, cannot apply. The public cannot, like an individual, be always on the watch. If they employ agents, those agents may sleep, or, what may be worse, they may wink; and how can the public watch the winker? The public is continually exposed to imposition; and if they trust, it is because they are obliged to trust. Their confidence is not voluntary, like that of an individual, who may transact his own business. The public can act only by agents, and cannot, therefore, be subjected to the rule of watchfulness.

The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a pub-

lic offence, that it should be committed by means of tokens, or false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public.

2. This distinction in principle is illustrated by many precedents, which are collected by the elementary writers upon this subject.

East, in his *Pleas of the Crown*, p. 821, prefaces his collection of them by this observation — “So all frauds affecting the crown, and the public at large, are indictable, though arising out of a particular transaction, or contract with the party. This was admitted by the very terms of the objection in the following case.” He then proceeds to give the substance of the indictment in *Treves’s case*, from the manuscript notes of Judge Buller, and the other judges. It was for knowingly, wilfully, deceitfully, and maliciously furnishing certain French prisoners, whose names were unknown, then being under the king’s protection in Eastwood Hospital, five hundred pounds of unwholesome bread, whereby they became injured in their health, to the great damage of the prisoners, the discredit of the king, the evil example, &c., and against the peace. The objection was, that it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty. This objection was overruled, but it did not appear upon what ground; nor is it material, because the case is cited for the principle admitted in the objection; which principle is, that if it had been in fraud of a contract with the public, the indictment would have been good. It may have been supported upon the principle which we have before assumed, that a fraud, which is to the injury of an indefinite number of persons, who have no separate individual cause of complaint, is indictable at common law. Such was the case in 2 Chitty, *Crim. Law*, 559, 560, against a baker, for delivering bread short in weight, under a contract with the guardians of the poor of Norwich, “to the great damage and prejudice of the said poor persons, of and belonging to the said city of Norwich and the liberties thereof, for whose use, sustenance, and support the said loaves of bread were so made and delivered, as aforesaid.”

Here the immediate injury was done to a sort of public, — a *quasi* public, — the poor of the city; an indefinite number of persons, who, individually, could not prosecute, unless for separate and individual injury actually received, as in the case of a public nuisance.

Chitty, in his note to this case, says — “This indictment, for non-delivery of bread of sufficient weight, was settled on the decided opinion of a very experienced barrister, that the offence

was indictable, on the ground stated in 2 East, P. C. 281, (821); — that all frauds, affecting the public at large, are indictable, though arising out of a particular transaction or contract.”

The case of *Dixon*, in 3 Maule & S. 11, was for furnishing unwholesome bread for the children at the Royal Military Asylum at Chelsea. This was an indictment at common law, and had three ingredients, either of which was sufficient to support it, namely: 1st. That it was a fraud upon the government, the asylum being a royal institution; 2d. That it was to the injury of an indefinite number of children, who were supported at the asylum; and, 3d. That the means used, namely, selling of unwholesome bread, were such as were likely to injure the public at large. No question was made whether it was not an offence at common law.

In *Powell's case*, 1 Dallas, 47, the principle is more clearly recognized by the Supreme Court of Pennsylvania. It was an indictment at common law against a baker employed by the army of the United States, for a cheat in baking two hundred and nineteen barrels of bread, and marking them as weighing eighty-eight pounds each, whereas they weighed only sixty-eight pounds. It was objected that such fraud was not indictable at common law.

But “the court said that this was clearly an injury to the public; and the fraud the more easily perpetrated, since it was the custom to take the barrels of bread at the marked weight, without weighing them again. The public, indeed, could not, by common prudence, prevent the fraud; as the defendant himself was the officer of the public, *pro hac vice*. They were, therefore, of opinion that the offence was indictable.”

Here it is evident, that the ground upon which the indictment was obtained was, the injury to the public.

So in the case of *Rex v. Bembridge and Powell*, cited in 6 East, 136, “who were indicted for enabling persons to pass their accounts, at the pay-office, in such a way as to enable them to defraud the government; it was objected, that it was only a private matter of account, and not indictable; but the court held otherwise, as it related to the public revenue.”

In *Brown's case*, 3 Chitty, 701, the indictment was against an overseer of the poor of the parish of Twickenham, for fraudulently applying to his own use money received by him for the parishioners, and rendering false accounts, to conceal the fraud, “to the damage and impoverishment of the said parishioners.”

This was a fraud upon an indefinite number of persons, who could not individually obtain redress. (See also *Martin's case*,

3 Chitty, Crim. Law, 704. Other cases of indictments for frauds upon the parish, may be found in Comb. 287; 5 Mod. 179; 2 Campb. 269; 1 Bott. 342; 2 Nolan's Poor Laws, 248, 371.)

Robinson's case, 3 Chitty, 666, was an indictment against a surveyor of highways, for a fraud upon the parishioners, by appropriating gravel, labor, &c., to his own emolument.

So in the case of *The Minister of St. Botolph*, 1 W. Bl. 443, the rendering of a false account of moneys collected for the relief of certain sufferers by fire was said to be an indictable offence. This could only be because it was a fraud upon an indefinite number of persons, who had no individual means of redress.

So a fraud upon a parish by procuring the marriage of a pauper, so as to charge the parish, is indictable, upon the same principle. *Tarrant's case*, 4 Burr. 2106.

So also a fraud by an apprentice in obtaining the public money, by falsely enlisting himself as a freeman, is indictable at common law, because it concerns the public revenue. *Jones's case*, 1 Leach, 208.

These cases seem to establish the broad principle stated by East, in his Pleas of the Crown, 818, and 821, "That all frauds affecting the crown and the public at large," or effected "by any deceitful and illegal practice or token, (short of felony,) which affects, or may affect the public, are indictable offences at common law; and that under the terms 'public,' and 'public at large,' are included indefinite numbers of persons who have suffered a common or joint damage by reason of the fraud, and who have not individually a right to prosecute the offender."

In regard, however, to the present indictment, it is not necessary to extend the principle beyond fraud upon the public, if such be sufficiently set forth in the indictment.

The question then occurs, Does this indictment sufficiently set forth a fraud upon the public?

By the long established rules of criminal law in this country, every indictment must be "certain to a certain intent in general;" and "nothing material shall be taken by intendment." 2 Hawk. P. C. ch. 26, § 60; *Bayard v. Malcom*, 2 East, 33.

In the case of *The King against the Inhabitants of Lyme Regis*, Doug. 158, Mr. Justice Buller says: "Certainty, to a certain intent in general means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear; and is what is required in declarations, replications, and indictments, in the charge or accusation, and in returns to writs of *mandamus*." "The charge must contain such a description of the crime, &c. that without intending

any thing but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give." *Rex v. Horne*, Cowp. 682; 1 Chitty on Pleading, 237.

It is true, "that it is a maxim, in pleading, that every thing shall be taken most strongly against the party pleading; or rather, that if the words be equivocal they shall be taken most strongly against the party pleading them; for it is to be intended that every person states his case as favorably to himself as possible; but the language of the pleading is to have a reasonable intendment and construction; and where an expression is capable of different meanings, that shall be taken which will support the declaration, &c., and not the other, which would defeat it." *Wyat v. Aland*, 1 Salk. 325; *The King v. Stephens and others*, 5 East, 257; *Amherst v. Skinner*, 12 East, 270, and *Woolroth v. Meadows*, 5 East, 463.

The first question upon this point is, whether, if any fraud is sufficiently set forth in the indictment, it is a fraud upon the public.

It has been suggested, in argument, that as the money was charged by the United States to the account of Mr. Paulding, who is responsible for it, it was his money, and not the money of the United States, which was drawn out of his hands by the accused; and that, as Mr. Paulding is liable to the United States, and has given security, they have suffered, and can suffer, no loss; and, therefore, if any fraud was committed, it was a fraud upon Mr. Paulding, and not upon the United States.

But to this objection we think it may be answered, that it is not averred, in the indictment, that the money was charged to Mr. Paulding; it is only averred that it was "placed in his hands" "as navy agent;" and there is nothing stated in the indictment to show that it ceased to be public money in his hands.

By the 4th section of the Act of Congress of the 3d of March, 1809, [2 Stat. at Large, 535,] the navy agents are directed, "whenever practicable, to keep the public moneys in their hands in some incorporated bank, to be designated for the purpose by the President of the United States."

This clearly shows that the understanding of the legislature was, that the money, when it came into the hands of the agent, did not cease to be public money; and that if it should be lost without any negligence or fault of the agent, it would not be his loss, but that of the United States; and if the money should have been charged to him in account, we must suppose that

under such circumstances the United States would credit him for the loss.

It has been suggested, on the part of the accused, that he is only liable to the United States in a civil action for the money which he received. But if he is so liable, it must be upon the ground that the money which he received was the money of the United States. If Mr. Paulding was induced to pay these drafts by such artful contrivances or false pretences or tokens as could not be guarded against by ordinary care and prudence, the United States might, very justly, allow him credit for the loss; and as the loss in that case would fall on the United States, it would be a fraud on the public; and how would it be less a fraud upon the public if Mr. Paulding was not so deceived and imposed upon, but paid the drafts, knowing that the accused had no right to draw? It could not have been less a fraud upon the United States if others had participated in it.

For these reasons we think that the money drawn by the accused, out of the hands of Mr. Paulding, was the money of the United States; and therefore that the fraud, if any, was a fraud upon the public.

The next question is, whether the fraud be sufficiently set forth in the indictment.

An indictment must be at least as certain and precise as a special verdict, in which no material fact can be inferred.

This indictment is undoubtedly intended to be for a fraud, and ought to aver the means by which the fraud was effected. This is admitted by the terms of the indictment; for it avers "that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said two sums of five hundred dollars each, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The offence, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pretences previously set forth in the indictment; yet there is not, in the previous part of the indictment, any direct averment of any pretence, either true or false. It is true that there is a preceding averment "that the said letters and drafts, so as aforesaid written and sent and drawn and sold, and caused and procured to be issued as aforesaid, were, and each of them was, so written, sent, drawn, and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to

defraud the United States, and as false pretences, to enable him to obtain to his own use and benefit the said two sums of five hundred dollars each."

But it does not state what the pretence was. It does not state that the accused pretended or affirmed any thing to anybody. If there was no pretence there was no false pretence. Let us analyze this averment, and apply, as was, no doubt, intended, *singula singulis*.

It is, 1st. An averment that the letters were written without authority. 2d. That they were sent without authority. 3d. That the drafts were drawn without authority. 4th. That they were sold without authority. 5th. That the requisition was obtained without authority. 6th. That these things were not done for or on account of the public service, but for the private gain and benefit of the accused, and with intent to defraud the United States. But it is not averred that the accused ever pretended to any one that he had authority to write those letters, or to draw the drafts, or to obtain the requisition, or that they were for the public service, or that they were not for his own use.

It is true that it is previously averred, in the indictment, that he did "ostensibly for the public service, but falsely and without authority, cause and procure to be issued from the navy department a certain requisition," &c. But the words "ostensibly for the public service" do not amount to an averment that the accused pretended or affirmed to the Secretary of the Navy, or to any other officer of the navy department, that the requisition was for the public service.

But it is averred that the letters were written and sent, and the drafts were drawn and sold, and the requisition was obtained, "as false pretences."

The word "as" means like — not the thing itself, but something like it. But if it were to be construed as an averment that the letters, the drafts, and the requisition were false pretences, and by means of such false pretences the accused defrauded the United States, such an averment in an indictment is not sufficiently certain. The averment must state what was pretended; and that what was pretended was false; and wherein and in what particular it was false. The gist of the crime is the falsehood of the pretence; and it is therefore necessary that it should be made apparent upon the face of the indictment by positive and precise averments.

This rule is supported by many authorities. One only will be cited. It is the case of *Rex v. Perrott*, 2 Maule & Selwyn, 379. It is true, that this was an indictment upon the statute of

30 Geo. 2, c. 24; but the statute does not require that the pretences should be particularly set out, nor specifically negatived, the words of the statute being merely these: "That all persons who knowingly or designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandises, with intent to cheat or defraud any person or persons of the same," "shall be deemed offenders against law and the public peace," and shall be punished by fine, imprisonment, pillory, whipping, or transportation, &c.

But the judgment of the Court was only an application of a general rule in regard to all indictments, whether upon a statute or the common law.

The indictment averred that the defendant, intending "to cheat and defraud one Bullen of his moneys," &c., "unlawfully, wickedly, knowingly, and designedly, did falsely pretend to the said Bullen, that he, the defendant, could obtain a protection for Bullen by favor of the lords of the admiralty, by feeing the clerks, as he had an uncle, a lord of the admiralty, and that it would be no great expense, as he could get it done through favor," &c., "by means of which said several false pretences" the defendant obtained the money, &c.

The cause was brought up from the assizes to the King's Bench by writ of error; and the error assigned was, that there was no averment to falsify the matters of the several pretences set forth in the indictment, by which it could appear to the court, upon the face of the indictment, that any or either of the pretences alleged was false and untrue.

Lord Ellenborough, in delivering his opinion, said: "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." "To state merely the whole of the false pretence, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied by some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as a vehicle of the falsity; are we to understand from this form of charge, that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the fabrication should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in furtherance of that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to

give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached of falsehood."

"It has been argued, that perhaps every one of these charges may be false; but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specific averments, all that which is intended to be relied upon as false.

"The analogy to the crime of perjury is so strict, and justice also suggests the same, that I think it should be specifically announced to the party, by distinct averments, what the precise charge is. It has always been done in indictments for obtaining money by false pretences; and whenever a more general form of indictment has come under consideration, it has not met with countenance; but the court, as in *Rex v. Mason*, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself."

Mr. Justice Le Blanc in the same case said, "The argument is, that alleging that the defendant did falsely pretend, &c., &c., generally, and in a lump is equivalent to an averment that each of those pretences was false. But a number of pretences may consist of some facts which are true, and some false; and it is a necessary rule in framing indictments not only that the offence should be truly described, but that it should be described in such a manner as to give the party indicted notice of the charge. Therefore, when a party is charged with obtaining money under false pretences, the indictment ought to state in what particular such pretences are false. Here it is charged in the first count, that the defendant did falsely pretend "that he could obtain a protection from the lords of the admiralty, by feeing the clerk, as he had an uncle, a lord, and that it would be no great expense." "Now that is a pretence consisting of several facts, part of which may be true, and part false. It may be true that he had an uncle, a lord of the Admiralty; and if he had, it does not follow that the rest may not be true; therefore the indictment should have charged what part was false."

This case shows that, according to the general rule of certainty applicable to indictments, the particular pretences must be set forth, and it must be averred in what particulars they were false.

We are, therefore, of opinion that this cannot be sustained as an indictment for a fraud or cheat by false pretences.

But it has been contended, that it is a good indictment for a forgery at common law.

The forgery, it is said, consists in having, "ostensibly for the public service, but falsely, and without authority, caused and procured to be issued from the Navy Department of the United States," the requisition set forth in the indictment.

It is a sufficient answer to this idea to say, that the indictment itself admits it to be a true requisition, and contains no allegation that the defendant forged and counterfeited it.

The 2d count does not vary, substantially, in point of law, from the first.

Upon the whole, the judgment of the Court upon this demurrer, must be for the defendant.

The indictment upon the transaction with Mr. Harris, differs, in matter of law, from that upon the transaction with Mr. Paulding, in the following particulars only, namely:

1st. That it avers that two of the drafts drawn by the defendant upon Mr. Harris, were drawn in favor of a certain Thomas B. Pottinger, and sold by the defendant with the indorsements thereon of the said Pottinger, to C. S. Fowler, and "that the indorsements of the said Pottinger on the said drafts, were either the genuine indorsements of the said Pottinger, made thereon by him for the accommodation, and at the request of the said Watkins, and without any interest of the said Pottinger therein; or were falsely made thereon by the said Watkins."

2d. That it avers that Mr. Harris, being navy agent, on the 30th of September, 1827, at Boston, "made out his abstract of expenditures, as such navy agent, as required by the rules and orders of the Navy Department of the United States, for the 3d quarter of that year, ending on the said 30th of September; which abstract contained, among many other charges of expenditures as aforesaid, the following three items and charges, under the head of arrearages prior to 1827.

167. Sept. 1,	T. Watkins	draft	\$300
168. " 10,	do.	do. of	\$500 499.50
169. " 22,	do.	do.	500
			————— \$1,299.50

which abstract is set forth in words and figures; and it is further averred that the drafts referred to in the said three items were the drafts before charged to have been drawn in favor of C. S. Fowler.

The indictment then proceeds thus: "And the said Harris, having transmitted the said abstract to the said Watkins, as Fourth Auditor of the Treasury of the United States, who was the proper officer to receive the same, the said Watkins, in pursuance of his said fraudulent intent to deceive and defraud the said United States, and to consummate his said fraud, and to

cover and conceal the same, that he might thereby be enabled to keep to his own use, the moneys he had obtained by means of the said drafts, and thereby to defraud the United States, did, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently alter the said abstract, by erasing therefrom the words :

T. Watkins	draft	
do.	do.	of \$500
do.	do.	

opposite to the said dates of September 1st, 10th, and 22d, prefixed to the aforesaid three items and charges in the said abstract under the head of "arrearages prior to 1827, hereinbefore set out, with intent to defraud the United States."

And there is a subsequent averment, that the letters, drafts, and requisition, "and also the erasure of the said abstract, were made and done with intent to defraud the United States, and as false pretences to enable him to obtain and keep to his own use and benefit, the said several sums of money therein mentioned; and that by means of the said several false pretences, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said several sums, amounting to the sum of \$2,000, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

The averment respecting the indorsement of Mr. Pottinger, seems to be wholly immaterial to the charge contained in this indictment, which, like that in the other indictment, is for obtaining money by false pretences, and there is no false pretence alleged in regard to that indorsement. But if it were material, its alternative form would render it perfectly nugatory. It is an averment that it was made either by Mr. Pottinger, or Mr. Watkins, without fixing it upon either. This averment has no connection with the charge, and may be considered as mere surplusage.

The erasure of part of the abstract is charged to have been done by the defendant as a false pretence for obtaining the money for his own use. The indictment itself shows this to be impossible, because it shows that the money was obtained before the erasure was made. But it is also averred, that it was done by the defendant to enable him to keep the money to his own use. But the offence charged is not the keeping the money, but the obtaining it by false pretences.

The erasure, however, is also averred to have been made with intent to consummate his said fraud, that is, the fraud in obtaining money by false pretences. But the indictment shows that

that fraud, if committed at all, had been consummated before the erasure was made.

It is also averred, that the erasure was made with intent to cover and conceal his said fraud; but the charge in the indictment is for perpetrating, not for covering and concealing, the fraud. This averment, therefore, so far as it regards the charge in the indictment of obtaining money by false pretences, is wholly immaterial and irrelevant, and therefore may, in that respect, be considered as mere surplusage.

But it is said, that the averment concerning this erasure, constitutes a substantive and sufficient charge of another offence, namely, a charge of forgery at common law; and that whether the indictment be good or bad as an indictment for obtaining money by false pretences, it is good as an indictment for forgery.

It cannot escape our notice, that the only injury to the United States complained of in this indictment is by the fraud committed by false pretences; and that this forgery, if it be one, is only alleged incidentally as one of those pretences. The defendant was not informed by this indictment that he was to come prepared to answer to the crime of forgery. It contains but one count, and that is for obtaining money by false pretences; and if that same count contains also a specific charge of forgery, it is bad for duplicity. No man is bound to answer to two or more criminal offences in one count; and even if they are contained in several counts, and be not of the same nature or class, the Court will compel the prosecutor to elect that upon which he intends to put the accused upon his trial, (*Young v. The King*, 3 T. R. 106); but in no case is he permitted to join several offences in one count.

In civil actions, advantage can be taken of duplicity only by special demurrer; but in criminal cases it is fatal on general demurrer. Arch. Crim. Pleadings, 25; *Commonwealth v. Simonds*, 2 Mass. Rep. 163; *United States v. Sharpe*, 1 Peters, 131; *State v. Montague*, 2 McCord, 287.

The present count undoubtedly contains a clear and distinct, although not a sufficient, charge of fraud by false pretences. If it contains also a charge of forgery, it is bad for duplicity. It does not, however, seem to us to contain a charge of forgery as a separate offence. What is said of the erasure is merely surplusage.

If this indictment cannot be supported as an indictment for forgery, (and we think it cannot,) it is bad as an indictment for obtaining money by false pretences, for the reasons stated respecting the preceding indictment.

The judgment upon this demurrer, also, must therefore be for the defendant.

THRUSTON, J., dissented, and said, that on the day that the argument in this case was opened, he had not sat in Court, and the state of the weather, his ill health, and the distance of his residence from the court room, had put it out of his power to examine the authorities on the subject as closely as he could have wished; but he believed he had heard the main part of the argument, and had paid very close attention to it; and he had brought his mind to the conclusion, that the demurrer ought to be overruled, and that the indictment was sufficient. In many of the views of his brethren he had concurred; but as to the insufficient averment in the indictment of a fraud at common law, he differed from them.

There was not a single charge in it of an act done, that was not set out most specifically to have been done with a fraudulent design. He did not know, he said, what the precise duties of the Fourth Auditor are. He did not doubt that the Fourth Auditor might have had a right to demand of the Secretary of the Navy a requisition, and that the issuing of the requisition might, if properly done, have been a legitimate act, which could not be questioned here. But the design with which the requisition was procured to be issued must be looked at. Subsequent acts, said he, show the design to have been fraudulent; and it is sufficiently set out, in the indictment, that all the acts enumerated in the bill were fraudulent, and were, therefore, false pretences. He did not concur with his brethren in their disquisition as to the signification of the word "as," which, he said, did not merely mean similitude, but properly formed part of the sentence containing the allegation of false pretences. I think, said he, that the indictment is sufficient, and that it gives full notice to the party of the charges against him. He did not express his opinion more precisely, for the reasons which he had stated; which was of less importance in this case, as his brethren had pronounced a contrary opinion. If this indictment was not a sufficient one, he concluded by saying he thought it was hardly possible to frame one that would sustain a prosecution for a fraud at common law against the United States.¹

Wednesday, June 3d. A third indictment was this day presented to the Court, to which, also, there was a general demurrer.

This indictment charged that the defendant, being Fourth Auditor of the Treasury of the United States, and "intending fraudulently and unjustly to obtain and acquire for himself and for

¹ The stenographer who reported this argument of the judge has certainly not done him justice.

his own private use, the money of the United States," "falsely and fraudulently" wrote a letter to Mr. Paulding, Navy Agent at New York, informing him that he had drawn on him for \$300, to be charged to arrearages prior to 1827, under which head a remittance would be made to him, immediately on the secretary's return to the city; and requesting Mr. Paulding, in the mean time, to pay the draft out of any unexpended balance in his hands, to be replaced on receipt of the treasurer's remittance. That the defendant drew the draft, sold it to Mr. Fowler, received from him the money, and disposed of it for his own use; and that the draft was afterwards paid by Mr. Paulding.

That the defendant, "ostensibly for the public service, but falsely, fraudulently, and without authority, caused to be procured and issued from the Navy Department of the United States a certain requisition to the Secretary of the Treasury of the United States, for the purpose and intent of placing in the hands of the said J. K. Paulding, Navy Agent, as aforesaid, the sum of \$300 of the moneys of the United States, (which requisition is set out *verbatim*,) by which the money was placed in the hands of Mr. Paulding; and the indictment charges that the said letter and draft, so as aforesaid written and sent, and drawn and sold as aforesaid, and the said requisition caused and procured to be issued as aforesaid, were, and each of them was, so written and sent, drawn and sold, and caused and procured to be issued as aforesaid, without any authority therefor, and not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and with intent to defraud the said United States, and as false pretences, to enable him to obtain and keep to his own use and benefit the said sum of \$300; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, defraud the said United States of the said sum of \$300, and dispose of the same to his own use and benefit, to the great damage of the United States, and against the peace and government thereof."

Mr. Key, for the United States, presumed that it would not be thought either unreasonable or disrespectful to the Court, that his learned associate (Mr. Swann, the District Attorney,) and himself had thought themselves justified and bound to offer an argument on this occasion. That this duty was, in some measure, thrown upon them by the circumstance, that the ground on which the indictments were now held to be insufficient was not touched by the argument offered under the former demurrers, and only now brought to their view, and the strong conviction they felt that it could be shown to be untenable.

They therefore hoped that, if the question presented by the present demurrer was the same, in every respect, with those already settled by the Court, the Court would reconsider their determination of this question; and, if they had inadvertently decided what was inconsistent with the principles they had themselves laid down, they would retract it.

He thought, also, that the indictment now in question might possibly be considered by the Court as presenting a different question, though he confessed that, to himself, it appeared to present the same.

He considered that two questions were now settled, as to this and the other indictments, by the opinion delivered: First, that defrauding the United States was indictable at common law, without the use of false pretences; secondly, that these indictments, as indictments for using false pretences, were not sustainable.

Considering these two points as not to be disputed, now the question for consideration is this—Is this indictment, though insufficient for a fraud effected by false pretences, good, as an indictment at common law, for a fraud on the United States, without false pretences? In other words, does the indictment, being insufficient for false pretences, vitiate it altogether, although there be a sufficient charge in it of a fraud on the United States?

He contended that, if the indictment contained a sufficient charge of the latter offence, namely, a fraud upon the United States, which required no false pretences, (as is decided,) and set out, also, a fraud perpetrated by false pretences, which were insufficiently set forth, the indictment must be held good for the offence which was well laid, and the rest would be held surplusage. It is on this ground that the indictments are now decided to be bad; a ground not taken in the argument.

He contended that the indictments were sustainable, as containing a charge of a fraud on the United States, which required no false pretences to be set out. The only argument urged against this position was, that a fraud upon the United States, like a fraud upon an individual, was not indictable unless effected by false pretences; and the Court has decided this question for us. It was never urged until now, in the Court's opinion, that if such a fraud was indictable on account of its affecting the public, though unaccompanied by false pretences, yet that an indictment which sufficiently set forth such a charge, though it need set out no false pretences, would be wholly vitiated by undertaking to set out such pretences, and setting them forth insufficiently. He thought they would be able to

satisfy the Court, from the clearest authorities, that the insufficient setting forth of such unnecessary matter could not vitiate what was sufficiently charged; that "*utile per inutile non vitiatur*;" and that, laying aside the averment of the acts being done as false pretences, there was, without it, a clear, definite, and sufficient charge of a fraud upon the United States, indictable, according to the Court's opinion, at common law. Here, as he understood the opinion of the Court, was the point of difference. Though not necessary to set out the acts done as false pretences, yet, if they are so set out, they must be proved as such; and, if insufficiently set out, the indictment is bad. This is the opinion, and this the ground of it, upon which the decision is made against the indictments. He should endeavor, with all respect to the Court, to show that it had been inconsiderately adopted.

As it may, however, be questioned whether the indictment contains, apart from the alleged false pretences, a proper charge of a fraud upon the United States, he would first consider what such an indictment ought to allege, as a sufficient statement of such an offence. The offence is fraud upon the United States, and all that can be necessary to set out in the indictment is, that the party accused intended to defraud the United States; that, in pursuance of that intent, he committed certain specific acts, and that, by those acts, the United States were defrauded. There can be no other necessary ingredient of the offence, according to the Court's opinion; for that has determined that the gist of the offence is defrauding the public, — defrauding the public by any acts, whether false pretences or not. Now it cannot be pretended that any of those ingredients are wanting here. It is alleged that the accused, devising and intending to defraud the United States, wrote and sent the letter of advice set out in the indictment, made the draft, and procured the requisition to be issued; and it is distinctly averred that, by these acts, he did defraud the United States of the sum of money mentioned in these instruments. Let the precedents be looked to, of the indictments for frauds on the public, in the cases cited in the argument, and they will be found to sustain this view of the case. None of them are more distinct and particular in their statements and averments, — few of them as much so, — as the indictment now before the Court. Here he referred to the indictment in the case of *Jones*, the apprentice, in *1 Leach*, and of the *Chelsea pensioner*, and the overseers of the poor, in *East and Chitty*; and contended that these cases, and the clear principles of criminal law, showed that nothing else could be necessary in an indictment than to state the intent, the fraud, and the acts by which it was perpetrated.

He proceeded, then, to inquire whether, as more than this was done, — as the acts by which the fraud is charged to have been effected are called “false pretences,” or “as false pretences,” (as the Court have considered the averment,) with averments of the falsehood of the pretences, — this unnecessary addition to the indictment can be held to avoid it altogether, admitting it to be settled by the Court’s opinion that these are not such false pretences, nor so set out as would be sufficient to sustain the indictment, as an indictment for obtaining money by false pretences. That all these parts of the indictment are unnecessary parts, either wholly irrelevant, or immaterial to the indictment, considered as an indictment for fraud on the United States, must be conceded, if he had correctly stated what such an indictment should contain.

The inquiry, then, is as to the effect of introducing unnecessary matter into an indictment which contains a sufficient charge of the offence. According to the Court’s opinion, it vitiates the whole indictment. The well settled principles of pleading, and the authority of numerous adjudged cases, will be found otherwise. 1 Chitty on Pleading, 231, 233, 234, 235; Archbold’s Crim. Pleading, 16. It is there plainly laid down, that matter wholly irrelevant, if stated, need not be proved; that matter relating to the offence, but not necessary to be stated, if stated, must be proved; and that in neither case can the introduction of such matter vitiate the indictment, declaration, or plea, (for there is no difference, as to this inquiry, between civil and criminal cases,) except where the matter thus unnecessarily introduced, shows that the party using it has no cause of action. In that case he agreed that the party, thus showing what defeats himself, makes his count good for nothing. But nothing short of this will have such an effect upon his pleading. It must, as both Chitty and Archbold state it, show that he has no cause of action, and the setting out of such unnecessary matter defectively and informally, is quite a different thing; the passage cited from Archbold, shows that it does not vitiate, and may be considered as surplusage. The cases by which both these writers illustrate the principle they lay down, make this distinction obvious. It is the distinction, well taken, — and which must be familiar with the Court, — between a cause of action defectively set forth, and a defective or bad cause of action. It may seem subtle; but the least attention comprehends it. It may be illustrated in the case of an indictment for forgery. You must charge the act done with intent to defraud another. To what extent and in what way the fraud was to affect him, need not be set out. But if you do set it out unnecessarily, and it appears from your own

showing, that it could not in any way defraud him, the indictment is bad. Not so if you set it out informally and defectively, so as not to appear whether it could or could not defraud him. The cases are innumerable which sustain this position.

In East's Crown Law, 821, 822, is a case of indictment for a cheat at common law, by false pretences, which were by the Court deemed insufficient, so that that ground of the prosecution failed; yet the Court, seeing enough in the indictment to constitute a charge for conspiracy, apart from the false pretences, sustained it on that ground.

The next case also was for a cheat by false tokens, and the false tokens were not sufficiently set forth; but the Court sustained it as an indictment for forgery at common law, because it contained enough to constitute such a charge. So in *Swee's case*, 1 Dal. 45, which was upon an indictment for forgery at common law; but the Court, being of opinion that the paper altered was not the subject of forgery at common law, rendered judgment as for a cheat. So in 2 Mass. Rep. 77, the indictment was for forgery under a statute; and not being sustainable on that ground, the court sustained it as for a cheat at common law, and this Court and all other courts continually do the same thing. There is a large class of cases of indictments for various offences under particular statutes, and if the special circumstances necessary to bring them within the purview of the statute are insufficiently set out, the uniform and settled practice of this, and every criminal court, is to consider all those parts of the indictment which refer to the statute, and which go to state and aver the offence to be within the statute, as mere surplusage, and to sustain the indictment upon the common-law charge.

The only remaining inquiry is this: Does the statement of the unnecessary matter in this indictment show a defect in any of the ingredients necessary to constitute the charge of a fraud upon the public? The intent to defraud is plainly charged, the actual perpetration of the fraud as plainly, and the acts, by which the fraud was committed, are set forth; namely, the letter, the draft, and the requisition. Are these acts such as could not defraud the United States? This is all that is left to hang an objection upon; and can the Court say that these acts cannot defraud the United States? The only ground upon which it could be so pretended, is removed by the opinion delivered, that it was the money of the United States that was obtained by these acts, from Mr. Paulding, and that, if so obtained, it was a fraud upon them.

If such nice criticisms and objections are to be discussed, not only upon the material parts, but upon every unnecessary state-

ment and averment that may be found in indictments, we shall have more than doubled upon us the evils that are already justly complained of. There was enough of this evil without such a practice, in the estimation of Lord Hale, who expresses himself thus upon the subject: "In favor of life, great strictness has been, at all times, required in point of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, to the encouragement of villany, and to the dishonor of God. And it were fit, that by some law, this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, grow mortal without some timely remedy."

Mr. Key admitted, that in his view of this case it presented the questions already decided. But he thought the Court's view of these cases would oblige them to consider it differently. The Court had insisted that the former indictments were for obtaining money by false pretences. But he did not think that an indictment, charging a fraud upon the public, in obtaining and keeping public money by certain acts specifically set forth, could be so considered because those acts were called false pretences. But the name thus given to those acts, it seemed, had unfortunately overthrown the indictments. Take away the name, and the indictments must have stood. For it has not been pretended in the argument, or in the opinion, that the acts of fraud are not set out with sufficient precision as acts of fraud. All the objection is, that they are not sufficiently set out as false pretences.

As the acts of fraud by which the intended offence was effected, they are set out with all the certainty and precision possible. The defendant is said to have written the letter, made the draft, and caused the requisition to be issued, with intent to defraud the United States, and the letter and requisition are set out in words and figures; the letter dated, "Treasury United States, Fourth Auditor's Office," and bearing on its face every official character; the requisition is averred to have been caused to be issued without public authority, ostensibly for the public service, but falsely and fraudulently for his own use. It is plain that nothing more particular could be necessary, or perhaps possible, to say about these acts. The fraud consisted in these acts; in these acts alone; unaccompanied by any other acts or circumstances. Nothing surely need have been said about

them, but that the defendant committed them with the fraudulent intent charged. But still these acts were called false pretences, and the indictments are bad.

Now it has so happened, that the indictment now before the Court does not give to the acts of fraud this unlucky name.

In the conclusion of these indictments, where alone this appellation is pretended to be given to the fraudulent acts, there will be found a little variation in the language. The former indictments spoke of these acts "as false pretences," and then said, "by means of which said false pretences" the United States were defrauded.

The indictment now before the Court speaks of the acts "as false pretences," and adds, that "by means thereof" the United States were defrauded. "By means thereof" is, by means of the acts before set out; and the averment therefore is, that by the acts set forth the United States were defrauded, and not that the United States were defrauded by means of false pretences; so that this indictment is clear of any averment of false pretences, which was fatal to the others.

If it be said that it charges them to have been done and used "*as false pretences*," then we say, with the Court, that *as* means *like*; and that the averment is, that the fraud was committed by means of certain acts, which were not false pretences, but *like* false pretences; so that the former indictments were for frauds by *false pretences*, and *this* is for a fraud by acts *like* false pretences, and thus, not having the ill-fated name given to the acts, it is clear of the faults of the other indictments.

Mr. Key also referred to *Lindsay's case*, in this Court, (1 Cranch, C. C. 245,) indicted under the Maryland Act of 1723, c. 16, for that he, being a shop-keeper, sold liquors to slaves on Sundays, and kept a disorderly house. It was objected that the Act of 1723 did not apply, because there was no averment that the traverser was a house-keeper, as required by that act; and that the indictment could not be sustained under the Act of 1784, because it was not averred that he was a retailer. But it was contended that, if not good under the statute, it was good at common law, for keeping a disorderly house, and it was so decided by the court.

Mr. Key also cited the following passage from Starkie's Criminal Pleading, p. 103 — "Next it is to be considered how far it is necessary to particularize, in describing the means of effecting a fraud. And first it may be observed, that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial."

Mr. Swann, District Attorney, on the same side, complained that the decision of the Court had left him in doubt as to the course he ought to pursue in framing new indictments upon the same transactions, and he was glad that this third indictment would afford the Court an opportunity of revising its decision.

The Court, in their opinion, seem to require averments which it may not be in the power of the government to sustain. The Court has said, that the cases cited "seem to establish the broad principle stated by *East*, in his *Pleas of the Crown*, 818, 821, that all frauds affecting the crown, and the public at large, are indictable offences at common law."

All, then, which was necessary in the indictment was, to set forth a fraud upon the public; and the Court went into an examination of the indictment, to see whether a fraud upon the public was sufficiently set forth. In this case, then, we must inquire whether the fraud alleged in the indictment is sufficiently set forth. The facts are few. It is alleged, in the first place, that the accused falsely and fraudulently wrote, addressed, and caused to be sent to *J. K. Paulding* the letter therein stated. In the next place, that he fraudulently and without authority caused and procured a requisition to be issued, for the money therein stated. And, finally, that he fraudulently drew upon *Mr. Paulding* for the money, and received and applied it to his own use; and that all this was done to defraud the United States.

As to the first of these allegations, nothing can be added to it. The accused wrote and sent it; and that is all, perhaps, that can be proved upon him.

The second allegation is, that he caused the requisition to be issued fraudulently, and without authority; and it presents the important question, whether, if an officer of the government shall fraudulently cause a requisition to be issued, without authority, upon the public treasury, and contrive to get and apply the money to his own use, he would be indictable at common law. In deciding this question, it would seem to be unnecessary to bring to our assistance the previous letter and the subsequent draft. The question might be rested upon the requisition itself; and upon that ground, and that alone, he should hold any man, who should practise such a fraud, indictable at common law.

It is not necessary that the accused should have made any false affirmation to any one respecting the fraud charged.

The case in *Maule & Selwyn* was correctly decided; but it was a case of private fraud, and the indictment was under the statute, and required allegation of false pretences; and therefore

is not applicable to this case, which is for a fraud upon the public at common law, and does not require false pretences.

Mr. Coxe, for the defendant. All these indictments appear to be based on one erroneous fundamental principle.

The true principle, which pervades the whole criminal law, is, that every indictment must contain specific averments of the facts which constitute the crime imputed, in order that the parties accused may be prepared to meet it.

The facts stated in the indictment are not, *per se*, criminal; and the addition of the adverbs "fraudulently" and "falsely" cannot supply the want of the averment of those facts, which make the facts stated in the indictment criminal. The manner in which the fraud was effected must be stated. *Rex v. Mason*, 2 T. R. 581; *Rex v. Holland*, 5 T. R. 581; *Rex v. Munoz*, 2 Str. 1127.

The averment that these things were done without authority, and with intent to defraud the United States, is not sufficient. The manner of the offence must be charged. 2 Hale, 184. If the averment of false pretences be stricken out, as surplusage, there is no fact alleged which shows that the acts done were criminal.

Mr. Jones, on the same side. There are two reasons for precision in indictments, namely, that the charge should be simple, and reduced to a single point; and that the defendant may know with certainty against what he is to defend himself.

This precision is as necessary in an indictment for a fraud upon the public, as for a fraud upon an individual. Every injury to the revenue, or to the public, is not necessarily a fraud. A direct and open breach of trust in a public officer is not an indictable offence at common law. There must be some deceit. It must be by a practice, or token, which may affect the public. East, P. C. 818. It is the machinery of the fraud which makes it indictable. Russell, 1308. It must be by means which affect, or may affect the public, and against which common prudence cannot guard.

As great precision is necessary in an indictment at common law as under a statute. The means, the facts that show the fraud, must be set forth; the contrivance, the machinery. Archbold, 16, 17, 18.

If the averments which are said to be mere aggravation be struck out, what is there left?

The words "falsely" and "fraudulently," and "with intent," &c., will not supply the want of an averment of the facts necessary to show the deceit. "Without authority." Whose authority? — what authority? "Ostensibly for the public service." How ostensibly? It is no averment of a fact.

It is contended, on the side of the prosecution, that if the

indictment states enough to constitute an offence, it is immaterial what else is averred; but if you set out what is not material, you must prove it.

Gover's case does not show that you may indict for false pretences and convict for forgery, upon the same count. You can charge only one distinct offence in one count. Too much is as bad as too little. But this indictment does not contain distinct charges of distinct offences. It purports to charge one offence only, and that is for obtaining money by false pretences.

Mr. Jones cited Arch. Crim. Pl. 19, 27, 30; *Gover's case*, East, P. C. 824; S. C. in Sayer's Rep.; *McCarthy's case*, East, P. C. 823; Russell, 1361 – 1370.

Mr. Key, as to the definition of forgery at common law, cited East, P. C. 852, 1022; Starkie, Cr. Law, 103; *United States v. Castor*, in this Court, at Alexandria.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., dissenting.)

This is a third indictment at common law, against the late Fourth Auditor of the Treasury of the United States, for a fraud upon the public, in obtaining the money of the United States by means of false pretences.

It is said to be, in point of law, exactly like the former indictment, founded upon the transaction with Mr. Paulding, except that, instead of averring, at the conclusion of the charge in the indictment, that the fraud was effected by means of the said several "false pretences," it avers that it was effected "by means thereof," that is, of all the acts which, in the preceding part of the indictment, had been set forth and averred to have been done by the defendant, "as false pretences."

The demurrer upon this indictment not having been submitted to the Court, with that in the former case, has afforded the counsel of the United States an occasion to question the correctness of the principles and of the conclusions which are stated in the opinion of the Court in that case, and has given the Court an opportunity, of which it has availed itself, to review its opinion, under the additional light afforded by the able argument of the learned counsel, directed exactly at the opinion itself. We have been the more willing to do this, because, as there is no appeal in these cases, a heavier responsibility is thrown upon this Court. We shall proceed, therefore, to a consideration of the points in which the correctness of our former opinion has been questioned, with a hope and a confidence that, if in this examination we shall find that we have committed an error, we shall not be prevented, by any pride of opinion, from acknowledging it with candor, and correcting it with pleasure.

We have taken time to examine the authorities to which we have been referred, with a degree of attention, as we hope, in some degree commensurate with the importance of this cause in the estimation of the public, and with its real importance in point of law.

The objection taken, by the counsel of the United States, to the decision of the Court in the former case, is, in substance, that the Court drew a false conclusion from the premises which they had established.

The argument on the part of the United States is, in substance, this :— According to the opinion of the Court, every indictment which sufficiently sets forth a fraud on the public, effected by means other than false pretences, is a good indictment at common law.

This indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences.

This is, therefore, a good indictment at common law. The conclusion is just if the premises are true.

The major proposition may, for the sake of argument, be admitted to be true.

But the minor proposition, namely, "That this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences," is now, as it was in effect before, denied by the Court. It was, therefore, incumbent upon the counsel of the United States to prove it before they could arrive at their conclusion.

Have they done so? and how?

They take it for granted that they have proved the proposition when they show, that it is alleged in the indictment that "the accused, devising and intending to defraud the United States, wrote and sent the letter of advice set out in the indictment—made the draft and procured the requisition to be issued"—(and we will add, what they omitted, sold the draft, received the money, and applied it to his own use,) "and that it is distinctly averred that by these acts he did defraud the United States of the money mentioned in these indictments."

And the counsel for the United States contend that "all that can be necessary to set out in the indictment is, that the party accused intended to defraud the United States; that in pursuance of that intent he committed certain specific acts; and that by those acts the United States were defrauded."

By the expression "set out" the Court understood the counsel of the United States as meaning no more than "aver" or "allege;" and the Court, therefore, understood them, in effect, to say, that it is only necessary, in an indictment at common

law, for a fraud upon the United States, to aver that the defendant did certain acts with intent to defraud the United States, and that by those acts the United States were defrauded; although the same acts, without the averment of a criminal intent, should appear to be innocent.

The proposition to be proved is, "that this indictment does sufficiently set forth a fraud upon the public, effected by means other than false pretences."

It must sufficiently set forth a fraud.

Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law, so far as the moral character of the act is involved. To aver that an act is fraudulently done, is, therefore, so far as the guilt or innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud, is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkie, in his late treatise on criminal pleading, in p. 163, says: "Whether particular circumstances constitute an indictable fraud, is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out, in order to show that the facts amount to an indictable offence."

The case of *The King v. Knight*, 1 Salk. 375, was an information against a receiver-general for falsely indorsing certain exchequer bills, and paying them into the exchequer "as if they had been received for customs, and as if they had been truly indorsed; to the deceit and fraud of the king."

The statute of 8 and 9 W. 3, c. 20, § 65, required him "to put his name to the bill." The information only charged that he indorsed it. Lord Chief Justice Holt, in delivering the opinion of the court, said, "The word indorse is not sufficient; for *indorsavit* imports a writing on the back of a thing, but not putting his name upon it. But it was urged by the king's counsel that it might plainly be understood by the words *quasi receptæ essent pro custumiis*. I answer this by argument only; and informations are nought for that very cause; for all charges ought certainly to be set out in pleading. But further it was urged that it is said, *falso indorsavit in deceptionem domini regis*, and so found by the jury; and, though a fact that appears innocent cannot be made a crime by adverbs of aggravation, as *falso*,

fraudulenter, &c., yet where a fact stands indifferent, as writing, which may be true or false, and is charged to be *falso*, and the jury find it so, all are then estopped to say the contrary. On the other side it was said, *in deceptionem* is only matter of conclusion. But here is no charge; it is not enough to say the king is cheated; he must appear to be so." Again, in the same case, as reported in 3 Salk. 186, it is said, "To say, *falso indorsavit quasi receptæ essent*, is no direct charge of any thing that is criminal. 'T is true it is said *in deceptionem domini regis*; but this is only matter of inference and conclusion; whereas the charges contained in every indictment ought to be so certain that the defendant may know what answer to make, and that the court may set the fine in proportion to the offence; and likewise, that if the defendant should be indicted again for the same fact, he may plead *autrefois convict*, (that is, that he has been before convicted.) 'T is true that the jury have found that the defendant *falso indorsavit*; but that will not fix the guilt; for they are only to find the contents of the indictment, and if that will not amount to a crime, the adverb *falso* will not make it so."

So also Lord Mansfield, in *Rex v. Woodfall*, 5 Burr. 2666, says, "that all the epithets in the information were formal inferences of law from the printing and publishing," and "that the verdict finds only what the law infers from the fact." Again, in p. 2669 he says, "if they" (the jury) "meant to say that they did not find it a libel, or did not find the epithets, or did not find any malicious intent, it would not affect the verdict, because none of those things were to be proved or found either way."

The language of Starkie, also, (Crim. Pl. 85,) is this: "It has been said, that where the fact laid in the indictment appears to be unlawful, it is unnecessary to allege it to have been unlawfully done. In truth the averment is in no case essential, unless it be part of the description of the offence as defined in some statute; for if the fact, as stated, be illegal, it would be superfluous to allege it to be unlawful; if the fact stated be legal, the word *illicite* cannot render it indictable; and the same observation is applicable to the terms wrongfully, unjustly, wickedly, wilfully, corruptly, to the evil example, maliciously, and such like; which are unnecessary if they are not to be found in the very definition of the offence, either at common law, or in the purview of the statute."

So also Archbold, in his treatise on criminal pleadings, p. 23, says, "An indictment for an offence against the statute must, with certainty and precision, charge the defendant to have committed the acts, under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in

the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor will the conclusion, *contra formam statuti*, cure it."

One of the necessary and essential ingredients of fraud is deceit. Without deceit there can be no fraud, in the legal sense of the word. No fraud can be committed but by deceitful practices; practices calculated to deceive. There may be injuries to the public without deceit, and they may be indictable at common law, but they cannot be frauds. The particular deceitful practices, by means of which the fraud is alleged to have been committed, must be specially set forth; so that the deceit may appear upon the face of the indictment, in order that the Court may judge whether the fraud which constitutes the crime can be inferred from the facts stated in the indictment. Whether the deceitful practices consist of false tokens, or fabricated letters, or forged notes, or false pretences, expressed either by words or signs or acts, they must be set forth with proper averments, showing and falsifying the pretended facts which were the means of the deceit.

If, then, the law is, as we have stated it to be, that fraud is an inference of law from certain facts; that every indictment for fraud is bad which does not positively aver all the facts necessary to raise that inference of law; that the expressions "fraudulently and with intent to defraud the United States," and "that the United States were defrauded," are not averments of matters of fact, but of inferences of law; there will be nothing left, according to the idea of the counsel of the United States, as to what is necessary in an indictment for fraud upon the United States, but the averment that certain apparently innocent acts were done by the defendant.

Let us, then, according to the terms of the proposition, exclude from this indictment all the averments respecting false pretences; and let us exclude those allegations which are not averments of matters of fact, but of inferences of law; and the following averments of facts will be all that are left, namely: That Tobias Watkins, on the 8th of October, 1827, being then 4th Auditor, &c. at Washington county aforesaid, with force and arms, wrote and addressed and caused to be sent to J. K. Paulding, then a navy agent of the United States at the city of New York, the letter of that date set forth in the indictment; and on the same day drew the draft on the said J. K. Paulding, navy agent, for \$300, and sold and delivered it to C. S. Fowler, and received from him \$300 therefor, and kept and disposed of the same for his own use; which draft was afterwards paid by the said J. K. Paulding. That the said T. Watkins did after-

wards, on the 6th of November, 1827, at Washington county aforesaid, cause and procure to be issued from the Navy Department of the United States, the requisition set forth in the indictment, for the purpose of placing in the hands of J. K. Paulding, navy agent as aforesaid, the sum of \$300 of the moneys of the United States, which was by that means done. And that these things were so done by the said Tobias Watkins, not for or on account of the public service, but for the private gain and benefit of the said Tobias Watkins, and to enable him to obtain and keep, to his own use and benefit, the said sum of three hundred dollars; and that, by means thereof, the said Tobias Watkins did, at the time and times aforesaid, dispose of the same to his own use and benefit.

These are all the facts remaining in the indictment, upon which the Court is called upon to decide whether the indictment is good, as an indictment at common law, for a fraud upon the United States.

We look in vain among these facts, for such as show that deceit which is an essential ingredient in fraud.

There is no fact averred in relation to the letter, or the draft, or the requisition, which shows any deceitful practice, any attempt to deceive anybody, or to impose upon any agent of the government. Upon that most essential point the facts give us no information. Fraud, even in civil cases, is never to be presumed; and in criminal cases the accused is always presumed to be innocent until the contrary appears.

But it has been suggested that the letter, the draft, the requisition, and the receipt and application of the money to his own use, by the defendant, he then being 4th Auditor of the Treasury Department of the United States, do, of themselves, show a fraud.

They might, indeed, be evidence contributing to establish a charge of fraud, upon the trial before the jury; but the Court is not now to inquire what might be the evidence of fraud. The question is, what are the allegations, not what is the proof; for, however strong the proof might be, the Court could not give judgment against the accused, if the offence should not be sufficiently alleged. The simple averment that the defendant wrote the letter is not the averment of any fact which might be inferred from the fact of his writing the letter. So in regard to the averments respecting the draft and the requisition, and the receipt and misapplication of the money; they do not amount to an averment of any inference which might be drawn from either of those acts, or from the combination of the whole. Whatever material inferences of fact might, in the opinion of the

counsel for the United States, be drawn from those facts, ought to have been averred as facts; and without such an averment those inferences cannot be taken into consideration by the Court in deciding upon the validity of the indictment, for the same reason which would exclude them in the case of a special verdict.

Excluding, therefore, those averments of false pretences, which, by the terms of the proposition, are to be excluded, and those averments which are only averments of inferences of law, and there remains no averment of fact showing that most important of all ingredients of fraud, the deceitful practice by which the fraud was or could be effected. The counsel for the United States, therefore, having failed to support the minor proposition of the syllogism upon which their argument is founded, must, of course, fail in their conclusion.

A great part of the argument of the counsel for the United States, in the present case, was founded upon a misapprehension of the opinion of the Court upon the former case. They, in effect, assumed, as one of the grounds of their argument, this proposition: that the Court decided the former indictments to be bad, because they were insufficient as indictments for fraud by false pretences, although they contained sufficient averments to make them good as indictments for fraud upon the United States without false pretences. But no such proposition was stated by the Court in its opinion. No opinion upon that point was given by the Court. On the contrary, the Court said: "It cannot escape our notice, that the only injury to the United States, complained of in this indictment, is by fraud committed by false pretences." And again, "The offence, therefore, which the accused is called upon to answer, is a fraud upon the United States, perpetrated by means of the false pretences previously set forth in the indictment."

If, indeed, the Court had seen, that, independent of the averments respecting false pretences, there were, in the indictments, other sufficient averments of facts showing other deceitful practices by which the fraud was committed, the question might have occurred which is now made, to wit, whether the indictments might not be good notwithstanding the allegation that the fraud was committed by means of certain false pretences imperfectly set out. The Court, however, did not see, in the indictments, any allegations of other facts showing other deceitful practices by means of which the fraud (in the language of Starkie, in the passage cited by the counsel for the United States in p. 103, 104,) "could have been effected." That passage was cited to show that it is not necessary to be very particular in setting forth the means by which the fraud was committed.

After saying, as before noticed, that, whether particular circumstances constitute an indictable fraud, is a question of law, and therefore must be set out, in order to show that the facts amount to an indictable offence, Mr. Starkie observes, in regard to the question, how far it may be necessary to particularize in describing the means of effecting the fraud, "that if some means be specified, and by those the fraud could have been effected, no objection can be taken on the ground that the description is not sufficiently circumstantial. The case from which alone he seems to have drawn this conclusion, was that of *Young et al. v. The King*, 3 T. R. 98.

The fraud, in that case, was effected by means of a false pretence, respecting a certain bet which the defendant had made "with a colonel in the army, then in Bath."

Upon a writ of error, one of the errors alleged was, that the name of the colonel was not stated in the indictment. But the objection was overruled by the Court, who said, that "perhaps his name was not mentioned, so that he could not have been described in the indictment with greater accuracy."

The general principle thus extracted by Mr. Starkie from this lean case of *Young et al. v. The King*, is cited to justify the Court in saying, that it is only necessary, in an indictment at common law for fraud against the United States, to state that the defendant did certain acts (whether fraudulent in their nature or not) with an intent to defraud the United States, and that they were defrauded thereby.

It is evident, however, that Mr. Starkie intended to say, in effect, that the means specified must be means by which it might be apparent to the Court that a fraud could be committed; that is, deceptive means, deceitful practices; for without deceit, or the use of deceptive practices, fraud cannot be committed.

The COURT, therefore, not having perceived in the former indictments any facts alleged, (except the false pretences, which are now admitted to have been imperfectly set out,) which showed any deceptive means or deceitful practices by which a fraud upon the United States could be effected, had no occasion to advance the doctrine which the counsel for the United States have supposed was advanced by the Court, nor to deny the principle contended for on the part of the prosecution, that "*utile per inutile non vitiatur*."

Whenever the circumstances of a case shall raise the question, whether an indictment for fraud alleged to have been committed by false pretences imperfectly set out, can be supported by evidence of other deceitful practices which may happen to have

been set out in the indictment, but not averred to be the means by which the alleged fraud was committed, it will be proper to decide it; and the cases cited by the counsel will deserve great consideration; but as we think that that question is not raised by the circumstances of the present case, it is not necessary to decide it now.

It has been stated in argument, by the counsel for the prosecution, that it has been settled by the opinion of this Court upon the former indictments, "that defrauding the United States was indictable at common law without the use of false pretences."

The proposition thus extracted, and drawn away from the ideas by which it was accompanied in the opinion which was given, and presented to the view thus baldly, appears to have misled the counsel for the United States, and may tend to mislead others. If the expression, "false pretences," be taken in its most extensive sense, it might, at first view, be doubted whether a fraud could be committed without a false pretence, for falsehood and deceit are the essence of fraud. But the phrase, "false pretences," has become familiar to the lawyer's ear; and ever since the statute of 30 Geo. 2, c. 24, which made certain frauds upon individuals indictable which were not indictable by the common law, the phrase has acquired a technical character, and has generally been understood as descriptive of such false pretences as were punishable by that statute, and as would make those frauds indictable which were not so before.

It is evident, by the manner in which it was used by this Court in its former opinion, that it was so understood by the Court, and was used as a description of a particular class of deceitful practices.

It is evident also, that the Court was considering the question, whether, in an indictment for a direct fraud upon the public, it was necessary that the fraud should appear to have been committed by the same sort of means which would be required to support an indictment at common law for a fraud upon an individual. Thus, after stating one of the grounds of the demurrer, namely, that fraud is not indictable at common law unless effected by means of some false token, such as false weights or measures or marks, &c., the Court said: "But to this it was answered, that frauds affecting the public at large, or the public revenue, constitute a distinct class of cases punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or by conspiracy, or by any particular sort of means; and this position seems to be supported by principle and by precedent." Again, the Court said:

"The principle, therefore, which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by means of tokens, or of false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public." The Court then proceeded to illustrate the distinction in principle, between public and private frauds, by many cases of indictable frauds, in which the deceitful practices by which the frauds upon the public were effected did not consist of false tokens, or false pretences, or forgery, or conspiracy; and then observed, that "these cases seem to establish the broad principle stated by *East*, (P. C. 818, 821,) that all frauds affecting the crown, and the public at large, or effected by any deceitful or illegal practice or token (short of felony,) which affects, or may affect the public, are indictable offences at common law."

These citations from the former opinion of the Court seem to us to show, conclusively, that the Court ought not to be understood as saying, that an indictment at common law for a fraud upon the United States, can be supported without the averment of facts which show that the fraud was committed by deceitful practices of some sort or other; although the Court did, in effect, say that it was unnecessary to show that the fraud was effected by means of tokens, or of false pretences, or forgery, or conspiracy; because there may be deceitful practices not included in either of those classes.

The counsel for the United States also misunderstood the opinion of the Court, in supposing the Court to have said, that an indictment which sufficiently sets forth a fraud upon the public, unaccompanied by false pretences, and which would be a good indictment without any averment of false pretences, would be wholly vitiated by undertaking to set out such pretences, and setting them forth insufficiently. Whatever the opinion of the Court might be in such case, it certainly was not expressed.

Again, it was stated by the counsel for the United States, that, according to the opinion of this Court, the introduction of unnecessary matter into an indictment vitiates the whole indictment. In this respect, also, the opinion of the Court was misunderstood. The Court gave no such opinion.

It was contended on the part of the United States, that the indictment is sufficient, because "the intent to defraud is plainly charged; the actual perpetration of the fraud as plainly, and the acts by which the fraud was committed, are set forth, the letter, the draft, the requisition;" and it was asked, "are these acts such as could not defraud the United States?"

It has been before observed, that the averment of an intent to defraud, will not supply the want of the averment of facts showing the deceitful practice which constitutes the essence of the fraud. It is not the injury alone, but the injury by means of the deceit, which constitutes the crime.

But it is said, that the actual perpetration of the fraud is plainly averred.

The simple averment of fraud, or that the United States were defrauded, is only the averment of a matter of law; a legal inference from facts; which facts must, themselves, appear to justify it.

The acts, by which the fraud was committed, it is said, are also set forth, namely, the letter, the draft, and the requisition. These may be among the acts by which the injury was done to the United States, but they are not such acts as show the deceitful practices by which the fraud was effected. The only facts, averred respecting those papers, are, that the letter was written and sent; the draft was drawn and sold and paid, and the requisition was procured. These facts, alone, do not show the fraud.

Again; it is contended, on the part of the United States, that, "whether these acts did defraud the United States as charged in the indictment, is matter of proof—is exclusively for the jury, and not for the Court."

Whether the acts were done, is certainly a question for the jury. But whether those acts did defraud the United States, namely, whether they amount to fraud, is unquestionably a matter of law. It is true, that in finding a general verdict, upon the general issue, in a criminal case, the jury must incidentally decide upon the law as well as the fact, because the question of guilt depends upon both law and fact, which cannot be separated in a general verdict; yet whenever, by the pleadings, or by a special verdict, which the jury have always a right to find if they will, the law is separated from the fact; the law is to be decided by the Court alone.

As the Court said so much, in its former opinion, respecting the degree of certainty required by the rules of the common law, in indictments, it forbears to add any thing upon that point.

But the propriety of adhering to the rule has been questioned, and the passage from Hale's History of the Pleas of the Crown, (vol. 2, p. 193,) so often quoted in support of defective indictments, has been again cited upon us. But his complaint of the over-nicety of the practice under the rule, is the strongest evidence of the existence of the rule itself. And the same venerated judge, in another part of his book, in speaking of presumptive

evidence, (p. 289, 290,) says, "it is better that five guilty persons should escape unpunished, than one innocent person should die;" and if his opinion had been required, there can be no doubt that his patriotism would have prompted him to say, that it is better that ten guilty persons should escape punishment, than that any one of those rules of the common law which were adopted for the protection of the personal liberty and safety of the subject or citizen, should be abrogated. Those rules of the common law were not imposed upon the people by an impending arbitrary power, but sprang up spontaneously in the midst of them, according to the exigency of the times. They were rights claimed and enforced by the unconquerable spirit of our sturdy ancestors, who to all the attempts made to deprive them of those rights, answered, with stern resolution, *Leges Angliæ nolumus mutari*. Such of our ancestors as were either driven or allured to this country, claimed the common law as their birth-right; and of all its provisions, they clung with most pertinacity to those upon which the security of their personal liberty depended.

It was upon the principles of the common law that our revolution was based and defended; and when the Colonies assumed the right of self-government, many, if not all of them, expressly declared that the people were entitled to the privileges and the protection of the common law, and this Court would betray the people if it should give them up. Next in importance to certainty in the law, is certainty in the accusation.

Mr. Starkie, in his treatise on Criminal Pleadings, p. 73, says, "The general rule has long been established that no person can be indicted, but for some specific act or omission; or punished, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record. Before this important part of the subject is resolved into its elementary divisions, it may be proper briefly to notice the principal reasons, on the ground of which the law exacts a certain particular description of the offence; for these, it is evident, supply the true test by which the sufficiency of any particular charge is to be ascertained.

"It is necessary, then, to specify, on the face of the indictment, the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence.

"1st. In order to identify the charge: lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief, for another, without any authority.

"2dly. That the defendant's conviction or acquittal may enure to his subsequent protection, should he be again questioned on

the same grounds. The offence, therefore, should be defined by such circumstances as will, in such case, enable him to plead a previous conviction or acquittal of the same offence.

"3dly. To warrant the court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of his case.

"4thly. To enable the defendant to prepare for his defence in particular cases, and to plead in all; or if he prefer it, to submit to the court by demurrer, whether the facts alleged (supposing them to be true,) so support the conclusion in law, as to render it necessary for him to make any answer to the charge.

"5thly, and finally and chiefly. To enable the court, looking at the record, after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment; and also in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender."

Such being the rule of the common law, such its foundation, and such its reasons, this Court thinks itself, not only warranted, but obliged, to adhere to it, whenever its benefit is claimed.

Upon the whole, the Court, after a very deliberate and anxious revision of its former opinion, has seen no cause to modify it in any respect; and perceiving no material difference, in point of law, between the present and the former indictment, we are of opinion that the judgment, upon this demurrer also, should be rendered in favor of the defendant.

THRUSTON, J., dissented. He observed that his indifferent state of health, and the distance of his residence from Washington, had, perhaps, abridged his opportunity of studying the legal points of the case; but he had listened attentively to the ingenious and elaborate argument upon it on the part of the counsel, and also to the opinion, just read, of the majority of the Court; and he thought that, though the reasoning of the latter might amount to good abstract law, it did not apply to the case before them. He thought that if so plain a subject could not be understood by argument, it could receive but little light from books. He had not had an opportunity to look at the indictment for more than a few minutes, and he had formed his opinion, which was based upon a conviction that the indictment ought to be sustained.

In determining a legal question, there were two extremes which ought equally to be avoided — there were two evils, the Scylla and the Charybdis; — too much refinement and subtlety on the one hand, was as much to be dreaded as too great a laxity on the other.

It was, as had been argued, highly proper that an accused party should know with what offence he was charged, in order that he might be enabled to make his defence. A statement of the crime alleged formed the substance of the indictment. And could any one say that the present indictment left the accused unprepared for defence, or unapprised of the charge against him? He could see no omission. He had read the indictment two or three times, and considered it to be fully sufficient; and as he had dissented from a majority of the Court, he thought it better to deliver his opinion now, than to delay the proceedings by taking further time for consideration.

He would briefly notice two or three of the points on which the majority of the Court thought the indictment not sustainable.

It had been urged, in reference to many of the cases cited, that it was not enough to allege that the king or the public had been cheated; but that it must appear that the cheat had been effected, and by certain means.

Well, he asked, did it not appear in the present case that the United States had been cheated? And was it not set forth that it was by the false and fraudulent means used? Here the judge read that part of the indictment charging the false and fraudulent means; and continued by asking, was not that a clear averment of falsehood and fraud? Then as to the false papers being written, &c., by him, as Fourth Auditor, or in his private capacity; in either case, he imagined the offence was punishable.

Supposing the same character to run through all the charges, he could not see why the indictment could be considered as not borne out. If the official character of the party run through the indictment, the offence would not only be a fraud, but also a violation of the dignity and duties of his office. If fraud was not sufficiently averred, he really did not know what words could be employed in charging it.

The judge proceeded to review the course adopted by the accused, to obtain possession of the public money.

He draws upon Mr. Paulding, not as an individual, but as a public officer,—a Navy Agent. He directs the draft to be charged to “Arrearages,”—a public fund. He states, also, that on the return of the Secretary of the Navy to the city, a remittance would be made to cover the draft. All these things showed that the proceedings were to be considered as public, or official. By these deceitful practices he entraps the Navy Agent, and obtains the public money. The letter further directs the draft to be paid out of any unexpended balance in the Navy

Agent's hands. Was there no fraud, no deceit in that? It was evident that the accused had no right to the money; was this direction, then, innocent, or was it a deceit? The indictment goes on to state that he drew and received the money, and that he applied it to his own use; was that no malversation? If the entrapping of the Navy Agent, and the application of the public money to his own private purposes, did not constitute fraud, he did not know what fraud was. The denouement of the drama was shown by the requisition. And there the judge begged to observe, that certainly it was not his desire to prejudice the defendant's cause, or to do him injury in any way; he would rather extenuate, as far as his official duty permitted; but he must ask if the averments, as to the requisition, did not show a gross fraud? It was charged that, for his own private gain and emolument, he procured this requisition to be issued, to replace the money he had previously drawn by artifice. And did not the requisition, connected with the other papers, — the letter and the draft, — show a plain and palpable fraud? It was a deceit in going to the Secretary of the Navy; the deceit, or rather the fraud, might not appear on the face of any one of the papers, taken by itself; but considering the papers in connection with each other, taking them altogether, the fraud was apparent.

The judge went on to repeat his opinion, that, taking into view the official relations of the accused and the Navy Agent, and the letter and draft, it was manifest that the former drew upon the latter out of the public funds. Did that, then, come up to the doctrine of the Court, that the papers themselves were not, on the face of the indictment, sufficient evidence of the fraud charged? He thought they were; and he thought that they had clearly shown a deceit *ab initio*.

Then as to the false pretences, by means of which the fraud was alleged to have been effected, if the documents appeared to be deceptive, he did not know why they should not be considered as such pretences. He thought they all appeared sufficient to sustain the indictment; they all imported a deceit, a false practice, a means to defraud the United States.

He referred again to the rule illustrated by Chitty, in respect to the position, that it was not enough to charge that the king had been cheated, but to make it appear that such is the case; and reasoned from it that, as fraud is an inference of law from matters of fact, the facts charged in this indictment were sufficient; and, as they are set out, show sufficiently the deceit on the face of them. Here, then, are not only averments of fraud, but the Court are enabled to see and judge of it, from the writings and documents set forth in the indictment.

He again reviewed the documents, and drew the conclusion, that, taken in connection, they showed the false and fraudulent purpose, and the deceitful practices. In private cases, the false pretences must be averred specifically and in full. In cases affecting the public it was not so. All that was necessary was to avoid stating the charge loosely, and in general terms, and to show that deceit had been practised.

It was his decided opinion, therefore, founded upon the deepest conviction, that the indictment was good, and ought to be sustained. In conclusion he observed, that, in giving that opinion, he had been actuated solely by what he conceived to be a sense of duty to himself, to the laws, and to the country. He was equally anxious for the preservation of the rights of justice, and for the prevention of any encroachments on the privileges of the citizens. He regretted to dissent from the views taken by the majority of the Court; but the opinion he held, he trusted, had been properly expressed; he was sure it was conscientiously entertained.¹

The next indictment brought before the Court, by demurrer, was against the defendant, for having falsely and fraudulently altered a certain abstract of account, rendered by Mr. Harris, Navy Agent at Boston, to the defendant, as Fourth Auditor, by obliterating the words "T. Watkins's draft," and "do. do.," prefixed to three items of the account, charging the United States with three drafts of the defendant, paid by Mr. Harris.

Mr. Coxe, for the defendant, contended that if this indictment charged any offence, it was forgery; for what is "falsely and fraudulently altering a paper," but forgery, if the paper be such as to be a subject of forgery? And yet the grand jury yesterday returned *ignoramus* to exactly such a bill as this, except that it contained the words "forge and." To alter, is to forge and counterfeit. Archbold, Crim. Pl. 189; 3 Chitty, 1022; Curwood's Hawk. c. 21, p. 262.

But it is not such a paper as can be the subject of forgery at common law. The abstract is only an account of the expenditures of the Navy Agent, for the quarter ending September 30, 1827. The erasure is only of the words, "T. Watkins's draft," in each of the three items; but the head of expenditures, namely, "arrearages prior to 1827," the dates of the items, and the sums, were left. This erasure could not injure or defraud the United States; and, at common law, there can be no forgery unless it be of a paper, or instrument, by the false making

¹ The above opinion of Judge T. is copied from the stenographer's report, p. 59, &c., but it is evident that justice has not been done to the opinion.

of which some person may be defrauded. *Ward's case*, 2 Lord Raymond, 1466; 1 Curwood's Hawk. c. 21, pp. 262, 265.

Mr. Key, for the United States, *contra*, contended that this was a good indictment at common law for forgery. It is not necessary that the words "forge and counterfeit" should be used. They are not technical words necessary in the description of the offence, like the words "feloniously" in felony, "traitorously" in treason, "burglariously" in burglary, and "murdravit" in murder. Forgery, at common law, is but a misdemeanor, of the same nature with fraud and cheating; and no technical words are necessary in describing it. 4 Bl. Com. 307; *Rex v. Dawson*, 1 Str. 19; *Rex v. Stocker*, 1 Salk. 371; S. C. 5 Mod.; Russell, 1411. Those terms of art are only necessary in capital cases.

Any writing, to the prejudice of another man's right, may be the subject of forgery at common law. The intent to defraud is necessary in forgery; and it is sufficient if some person could be defrauded by the alteration of it. The United States could be injured by the erasure, because it prevented the United States from seeing who got this money under the head of arrearages; so that they might follow it into the hands of the person who received it, and to recover it if he received it wrongfully, or misapplied it to his own use. The paper, unaltered, showed the defendant to be the debtor; but the altered paper showed Mr. Harris to be the debtor. Can it be said that the United States could not be injured by this alteration? It is not necessary that the United States should have been actually injured; it is sufficient if they might have been. Archbold, Cr. Pl. 191, 194; 3 Chitty, 1022.

Mr. Jones, in reply. If the question be doubtful, the circumstance that the counsel for the United States had sent up an indictment containing the words "forge and counterfeit," which was rejected by the grand jury, is a matter of fair argument that the counsel of the United States thought those words necessary in an indictment for forgery; or that this indictment was for a different offence.

But it does not charge any offence; or, if it does, it is not sufficiently set forth. "Fraudulently altered" would not be sufficient to charge a forgery. "Falsely," at least, must be added. But the words, "falsely and fraudulently alter," are not a sufficient substitute for *fabricavit* or *contrafecit*. Certain terms do of themselves import a crime. Precedents are the best evidence of the law. All the forms of indictment for forgery, at common law, adopt the word "forge;" and the reason is, that it is a word which has acquired, by long usage, a technical sense.

There is no difference between felony and misdemeanor, as to the necessity of certainty; and the necessity of describing the offence in technical language is not confined to capital cases. Whenever technical terms are a part of the description of the offence, they must be used. If other terms are substituted, by way of *periphrasis*, they must comprehend every idea contained in the word for which they are substituted. *King v. Knight*, Salk. 375; *Dawson's case*, 1 Str. 19, is only as to the evidence sufficient to prove a forgery, not as to the allegations in the indictment.

An indictment must be more specific than a special verdict. East, P. C. 862, 985; *Commonwealth of Massachusetts v. Mycall*, 2 Mass. Rep. 136.

This paper is not such as that the alteration of it can be, *per se*, a forgery. East, P. C. 859; 2 Curwood's Hawk. 263; *Ward's case*, Lord Raym. 1466; East, P. C. 864, note b.

The alteration was not in a material part. A public document, the alteration of which is, *per se*, forgery, must be a paper which purports to proceed from public authority, and to import public confidence. East, P. C. 859. If it be not such a paper, the indictment must set forth such circumstances as show how the United States could be defrauded by the alteration. *Ward's case*, Lord Raym. 1466; *Hunter's case*, 2 Leach, 719; East, P. C. 928, 977; *Rex v. Collins et al.* Palmer, 367, 373.

Mr. Key, in answer to these cases, cited *The King v. Powell*, 1 Leach, 90; Russell, 1440; 4 Bl. Com. 307.¹

The Chief Justice having been taken suddenly ill with a fever was obliged to leave the Court, which adjourned to Monday, the 15th, and from that day to Tuesday, the 23d of June, when the Chief Justice resumed his seat upon the bench, and on the 24th the opinion of the Court was delivered by THRUSTON, J., as follows, (CRANCH, C. J., dissenting.)

¹ If any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument. East, P. C. 978, c. 19, § 55; Arch. Cr. Pl. 189, 190, 191; 2 Chitty, 1038, (465.) *Quære*, whether it be necessary, in an indictment at common law, for forgery by alteration, to use the word "forge." East, P. C. 987; *Ellsworth's case*, Arch. 189, 191; *Rex v. Stevens*, 5 East, 259; 2 Chitty, 1042; 4 Day's Com. Dig. tit. Indictment, G. 6, p. 689, (542, n. a.) As to certainty and over-nicety, see *Rex v. Suddis*, 1 East, 314, Lord Kenyon's opinion; 1 Chitty, Cr. Pl. 168, 169, 170, &c., 153, 227; *Morgan v. Sargent*, 1 B. & P. 59, C. J. Eyre's opinion. When terms of art must be used. 1 Chitty, 175, 176, (119,) 239, (162.) The want of addition is bad on demurrer. 2 H. H. P. C. 176; *Rex v. Haddock*, Andrews, 137. If the act charged be not in itself unlawful, all the circumstances which render it unlawful must be set forth. 1 Chitty, 223, (154); 2 Chitty, 1041, (468,) 1042. Form of indictment at common law, for altering a sheriff's warrant to his bailiff. 3 Chitty, Cr. Pl. 1047, (474.) Form of indictment for forgery by erasure, under the statute of 8 & 9 W. 3, c. 20, § 36. *Rex v. Bigg*, 3 P. Wms. 419.

Various objections have been made to the sufficiency of the indictment in this case.

It will not be necessary, however, to notice any other than the first, which is, that the crime of forgery is not charged with sufficient technical precision.

It has been contended, by the counsel for the United States, that in none of the enumerated instances stated in the books, in which certain technical words are necessary to be used in the indictment, in the description of the particular crime, is forgery to be found as one; and hence the inference has been drawn that in an indictment for forgery, it is not necessary to state that the instrument was forged or counterfeited. The principal case relied on to strengthen this position, is *Rex v. Dawson*, in 1 Strange's Reports. But upon a careful examination of that case, it will be found that the only question was, on the special finding of the jury, whether the facts so found amounted to forgery; and therefore we think it not applicable to the question in the present case. We have felt very sincerely disposed duly to weigh and appreciate the able arguments which have been urged in support of the indictment. Upon a careful examination, however, of all the precedents of indictments for forgery at common law, which we have been able to lay our hands on, not one is to be found where the term "forged" or "counterfeited" has not been used, except in the present instance; and there is a circumstance, even in this instance, very worthy of notice; which is, that the learned counsel for the United States, in framing their indictment in a former recent case against this defendant for the same erasures or alterations of the abstract attached to the present indictment, and which, after having been acted on by the grand jury, was returned, "*ignoramus*," seemed to think it necessary to use the term, "forged," in addition to all the other terms used in this indictment. This opinion is certainly entitled to respect, and may be well added to the number of precedents before alluded to. In the absence, then, of any adjudged case to the contrary, we think there is much reason to say that where such has been the long, universal, and uninterrupted usage, such usage may be considered as having grown into law.

In further support of the necessity of using the technical term, "forged," or counterfeited, is the case in the Massachusetts Reports, *Commonwealth v. Mycall*. That was an indictment for altering a writ, after service, and before the return-day; and the terms used in the indictment, after stating the introductory part, were, "That he" (the accused,) "before the time of trial, did unlawfully erase in and from the said writ the word

"Essex," and did falsely and unlawfully insert in the room and place thereof, the word "Worcester," thereby falsely and unlawfully changing the same writ from a writ directed to the sheriff of the County of Essex, or either of his deputies, or the constable of Harvard within the said county, to a writ directed to the sheriff of the County of Worcester, or either of his deputies, or the constable of Harvard within the said county, with an intent to injure, oppress, wrong, and defraud the said J. R., against the peace," &c.

On a motion, in arrest of judgment, on the ground that these terms contain no technical description of forgery, the court say: "If the facts stated in the indictment constitute any crime at common law, it is forgery, but there is not the necessary technical precision in the indictment, to support a conviction of forgery, and judgment must be arrested."

Now, what was the term, in that case, which was required to give that indictment legal precision? It seems to us, none other than the word "forged." Are not the terms used in the indictment, in that case, as amply descriptive of the crime of forgery as those used in this case? We think they are.

These considerations are strongly corroborated by the observations of the able editor of the late American edition of Comyn's Digest, Vol. 4, title, "Indictment." G. 6, p. 688, note *y*.¹

¹ Speaking of technical terms, or words of art, he says: "Though for many of those terms, sufficient reason can be given, others, there are, which may not be so readily traced to their original, unless we consider them as invented by the lawyers of old, to confine the conduct of a cause to themselves; or as the offspring of chance, made sacred by time and habit; or ascribe them to a zeal for that system and method which ennoble even the meanest art, and give the air of science and wisdom. But from whatever source they spring, it seems proper to preserve them, to avoid, as well the possibility of error, as the disputes that may arise on every innovation. And however untenable upon principles of reason, it is sufficient that they are warranted by precedent; for it was observed, long ago, by Mr. Justice Stanford, upon the question whether any averment by the term *licet*, was sufficient, "if it was the usual form to allege it by *licet*, then I would hold with it." And after instancing certain cases in which the omnipotence of custom over reason was conspicuous, he concludes: "Wherefore, we ought to adhere to the usual form; but in this case it was not the usual form to allege the election under the word *licet*, as you may see in the book of entries; wherefore, since the prosecutor was not tied down to any usual form, but was at liberty to take such words as were proper for the matter, and has not done so, we ought not to hold with the words more than will warrant." And again, upon another occasion, though at the first, an avowry was held bad for want of being averred, yet afterwards, says the reporter, the prothonotaries searched their precedents, and told the justices that the common usage was to make the avowry without averment; with which the justices were satisfied.

Mr. Starkie, in his Criminal Pleading, pp. 69, 70, has the following judicious observations: "The law distributes crime into three great classes; treason, felonies, and misdemeanors inferior to felony. Each of these is attended with peculiar incidents, both before and after conviction. It is, therefore, one important office of an indictment to specify, in technical language, the particular genus of crime imputed to the defendant, that he may avail himself of those advantages which the law allows him;

We are, therefore, brought to this conclusion ; that there is a want of technical precision in the indictment, in the case before us, and as it is admitted that it cannot be sustained as an indictment of fraud at common law, the majority of the Court are of opinion that the judgment on the demurrer must be for the defendant. See also, in support of the opinion of the Court, *Burridge's case*, 3 P. Williams, 484, and *Margaret Cooper's case*, 2 Str. 1246.

CRANCH, C. J., dissented.

With the highest respect for the weight and authority of the judgment delivered by the majority of the Court, I am, nevertheless compelled to dissent from their opinion.

This is the fourth indictment against the defendant, to which he has demurred. It is in these words :

“ District of Columbia, Washington County, ss. The grand inquest, for the body of Washington County, do, upon their oaths present: That Richard D. Harris, being a navy agent of the United States, at Boston, on the thirtieth day of September, in the year eighteen hundred and twenty-seven, and having, on that day, made out his abstract of expenditures, as such navy agent, as required by the rules and orders of the Navy Department of the United States, for the third quarter of that year, ending on the said thirtieth day of September, which abstract was headed and entitled, ‘ Abstract B, of expenditures during the 3d quarter year 1827, ending Sept. 30th, by Richard D. Harris, Navy Agent, Boston,’ and purported to set forth the expenditures disbursed and paid by the said Harris as such navy agent, for and on account of the United States, and contained, among other charges of expenditures as aforesaid, the following three items and charges under the head of “ Arrearages prior to 1827 :

“ 167	Sept.	1	T. Watkins's draft,	\$300.00	
168	“	10	do. do. of \$500,	499.50	
160	“	22	do. do.	500.00	\$1,299.50 \$1,299.50.”

which said abstract was in the words and figures following ; (here was inserted the abstract,) which said drafts, so stated and referred to in the said three items and charges, were drafts drawn

that he may be excluded from those which the law withholds ; and that the court may be authorized, after conviction, to inflict the appropriate punishment.” A strict adherence to such language may, in some cases, appear too nice and critical, to serve the ends of justice ; yet it seems founded upon strong and substantial reasons. For instance, by successive decisions, the legal value and weight of a term or phrase, of art, is ascertained, and should a doubt arise as to its meaning, reference, for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent, would be wholly lost.”

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by said Watkins on the said Harris, navy agent as aforesaid, and dated on the fourteenth day of August, and the fourth day of September, and the nineteenth day of September, respectively, the year last aforesaid, in favor of Charles S. Fowler, and sold and delivered by said Watkins to said Fowler; and the said Harris, having transmitted the said abstract to the said Watkins, as 4th auditor of the Treasury of the United States, who was the proper officer to receive the same; and the said Watkins, having received the same, the said Watkins afterwards, to wit, on the first day of November, in the year last aforesaid, at the county aforesaid, falsely and fraudulently,¹ altered the said abstract, by erasing therefrom the words

“ T. Watkins’s draft.

do. do.

do. do.”

opposite to the said dates of September 1st, 10th, and 22d, prefixed to the aforesaid three items and charges in the said abstract under the head of “ arrearages prior to 1827,” hereinbefore set out, with intent to defraud the United States, to the great damage of the United States, and against the peace and government thereof.

THOMAS SWANN, Attorney United States.”

It is contended, on the part of the defendant, that this indictment, if it describes any offence, must be considered either as an indictment for a fraud or a forgery; that, as an indictment for a fraud, it is bad, because there is no averment of an injury actually done; that as an indictment for forgery it is also bad for several reasons:

1st. Because the offence is not set forth in the usual technical language descriptive of the crime of forgery, so that the grand jury might be aware of the nature of the offence with which they were charging the defendant.

2d. Because the paper altered is not such a paper, *per se*, as can be the subject of forgery by alteration.

3d. Because it does not appear by any circumstances stated in the indictment, that the United States could be injured by the alteration.

1. Under the first objection, it was contended that the word “ forged ” was a technical term, as necessary, in the description of forgery at common law, as the terms “ *felonice* ” in felony, “ *burglariter* ” in burglary, and “ *proditorie* ” in treason.

¹ The indictment which the grand jury had previously returned “ *ignoramus* ” was precisely like this, excepting that it had the words “ forged and ” before the word “ altered.”

But this position does not seem to me to be supported by the authorities. There has been no case cited in which it has been so ruled. On the contrary, the elementary writers, when they enumerate the crimes which must be described by certain terms of art, or technical phrases, do not include forgery in their list of crimes, nor the word "forged" in their list of terms. But when they come to define forgery, they call it "the false making, or alteration of such writings as, either at common law or by statute, are its objects, with intent to defraud another." 3 Chitty Crim. Law, 1022. And East, P. C. 852, says: "Forgery at common law denotes a false making, (which includes every alteration of, or addition to, a true instrument,) a making, *malo animo*, of any written instrument, for the purpose of fraud and deceit." "This definition," he says, "results from all the authorities, ancient and modern, taken together." Hawkins, B. 2, c. 25, § 57, after stating the cases in which no periphrasis, or circumlocution, will supply those words of art which the law has appropriated for the description of the offence, namely, murder, larceny, mayhem, felony, burglary, and treason, says, "that in other cases it is generally a good rule in indictments, as well as appeals, that the special manner of the whole fact ought to be set out with such certainty, that it may judicially appear to the court that the indictors have not gone on insufficient grounds."

It is true that the indictments for forgery generally use the term "forge," especially where the forgery consists in the false making of the writing; and the statutes having used that word in describing the crime, it became necessary to use it in indictments under those statutes, as part of the description of the offence. But when the forgery has been committed by alteration of an instrument by erasure only, the word "forge" does not seem to be properly applicable to, or descriptive of, the act done.

There is a precedent in 3 Chitty, Crim. Law, 1047, in which the words are "falsely alter," by deceitfully and falsely inserting and forging the name J. A., and "by deceitfully and falsely adding" s to the word bailiff. In the present indictment the word "forge" could not, with propriety, be introduced, unless the indictment were to charge the defendant with forging the whole abstract. It is said, indeed, that "if any part of a true instrument be altered, the indictment may lay it to be a forgery of the whole instrument," (2 East, P. C. 978,) and proof of altering a part will support the indictment. "It is more usual, however, and perhaps more prudent," says Archbold, (Crim. Pl. 191,) "at least in one set of counts, to charge it as an alteration merely,

and to allege the alteration specially." See also *Harrison's case*, 2 East, P. C. 980, 988, to the same effect.

The case of *Mycall*, cited from 2 Mass. Rep. 136, was shortly this: A magistrate of Worcester county issued a writ of attachment, directed to the sheriff of Essex county, and to the constable of Harvard within the same county, whereas Harvard was in Worcester county, and not in Essex. The writ having been returned served by a constable of Harvard, the magistrate, before the trial, erased Essex and inserted Worcester. The indictment charged that the defendant did unlawfully erase the word Essex, and did falsely and unlawfully insert, in the place thereof, the word Worcester; thereby unlawfully and falsely changing the same from &c. to &c., with intent to injure and defraud J. R., against the peace &c. After a verdict of guilty, and a motion in arrest of judgment, the court stopped the defendant's counsel, who was about to argue the point, and said: "If the facts stated in the indictment constitute a crime at common law, it is forgery; but there is not the necessary technical precision in the indictment to support a conviction of forgery, and judgment must be arrested."

The attorney-general had before stated to the court that it was not the intention of the grand jury to charge the defendant with forgery. It will be observed, in that case, that the court did not specify in what particulars the indictment wanted precision; they did not say that the word "forge" was necessary; nor is it so said in any other case which has come to my knowledge. But in the case of *Rex v. Stevens and Agnew*, 5 East, R. 259, Lord Ellenborough, in delivering the opinion of the court, said: "Every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use."

Forgery at common law is but a misdemeanor, and ranks with cheating and fraud, both as to the moral turpitude of the offence, and the degree of punishment. It is a branch of the *crimen falsi*, and differs principally from any other kind of indictable fraud in this: that it requires the use of a particular sort of means to effect the fraud, and is complete whether the intended injury be effected or not. There seems to be no reason why it should not be sufficient in an indictment for this, as for any other misdemeanor, to state all the facts which, in law, constitute the crime. I have not been able to find any precedent of an indictment at common law, for a forgery committed by erasure merely. I am

therefore not satisfied that a forgery, at common law, by erasure only, may not be sufficiently set forth, without using the word "forge" or the word "counterfeit."¹

After the judges had delivered their opinions, *Mr. Key*, for the United States, made a motion, which, at the request of the Court, he reduced to writing, as follows:

"The Court having delivered their opinion, on the demurrer, that the indictment in the above case is defective in not charging the alleged false and fraudulent alteration of the abstract by the technical term 'forged,' the counsel for the United States produced to the Court an indictment returned *ignoramus* by the grand jury, which is a literal copy of the indictment upon which the judgment of the Court had been just delivered, with the exception that it contained the words 'forged and' in addition to the terms in the indictment now decided on. And the counsel for the United States producing a new bill of indictment similar to the one now decided on, except that the technical term 'forged' is used in addition to the words charging the offence; and stating that they were about to send the same to the grand jury, prayed the Court to send for the grand jury and instruct them to the following effect:

"That the facts and intent found, in the indictment just decided on by the grand jury, as therein stated, constitute, in law, the offence of forgery at common law; and that the grand jury, if they find, in a bill of indictment, all the facts and intents necessary to constitute a legal offence, are bound to call the offence, in the indictment, by its necessary legal and technical name."

Mr. Key contended that the Court has a right to instruct either the grand or the petit jury upon the law of the case, either on behalf of the government or of the prisoner. The grand jurors are not lawyers; they may reject proper testimony, or receive improper. Such instruction may be required by either party; and without such a right justice cannot be done. If the grand jury ask instruction as to matter of law, the Court never refuses to give it; not because it is asked, but because it is wanted. If it appear, by any other means than asking, that they want the instruction, the Court will give it. It appears in Dalton's Sheriff, p. 515, that the grand jury may be brought into court and hear the witnesses in open court, where the court can instruct them. Suppose the evidence be all in writing, and the grand jury reject it—or suppose they return an insensible indictment;

¹ Upon the back of the original MS. of this opinion is the following indorsement, in the handwriting of the Chief Justice:—"Upon reflection, and seeing some other cases where technical words are required, such as 'scold' and 'barrator,' I am led to doubt whether this opinion is correct. W. Cr. 20th July, 1829."

the court will instruct them. The jury, indeed, may possibly disregard the instruction of the court as to matter of law, but this is no reason why the court should not instruct them. The right to ask instruction to the grand jury is reciprocal. It belongs to both parties; and this is a case in which, if in any, it ought to be asked and granted. 2 Holt, P. C. 157. In 1 Burr's Trial, 157, the motion to instruct the grand jury was made by Mr. Burr, debated, opposed, but granted by Chief Justice Marshall. So it has been always usual, in the general charge to the grand jury at the beginning of the term, to give them information as to the law of such cases as may be likely to come before them.

This is a case in which it is necessary to instruct them. The fact that they rejected the bill which contained the word "forged," and found the same bill without that word, shows that the reason why they rejected the first, was, that they thought the second bill did not charge forgery. But the facts contained in it did amount to forgery, and they ought to have found the first bill. It is evident, then, that they mistook the law. The grand jury have found all the facts which constitute the crime of forgery, and yet the prisoner escapes because a particular technical word is omitted! Is it fit that a culprit should escape on such a ground? Suppose the grand jury should find that the prisoner killed a man with malice aforethought, but should refuse to insert the word murdered, in the indictment, the court would send them back and instruct them that the facts found amount to murder, and that they ought so to find. It would be a disgrace to the court that should refuse so to instruct them.

The abstract was such a writing as might be the subject of forgery, and this he understands to be the opinion of this Court, or they would suffer him to argue this motion. If a grand jury should refuse to find a bill for treason, although they should have found all the facts which constitute treason, he would, if he were prosecutor, move the Court to discharge them, and have another grand jury immediately summoned, and should think it his duty to send up another indictment for treason. No grand jury can conscientiously reject a bill from feelings of tenderness, when the facts are clearly proved which constitute the offence.

What will be the appearance of our records, if these two indictments should remain upon them, as the matter now rests?

Mr. Jones, for the defendant.

We are continually doomed to be assailed with novel and irregular projects. The regular course is to send up the bill and the evidence, and the grand jury proceeds to consider the case, *ex parte*.

The Court in charging the grand jury does not anticipate the

questions which may be involved in the issue to be tried. The instruction is wholly *ex parte*. Neither the accused, nor the government has a right to call upon the Court to instruct the grand jury upon the merits of the charge. The Court will not, in their charge, instruct the grand jury upon the whole facts of the individual case, and commit itself and prejudice the cause *ex parte*. It is only upon general principles which are clear, that the court will charge a grand jury. This is a glaring invasion of the regular practice in this and all other courts in this country, and in England. There is no case where the court has charged the grand jury upon the particular circumstances of the individual case.

The case of admissibility of evidence is a very different matter, and depends on a different principle.

The old practice mentioned in Dalton's Sheriff is obsolete. Grand juries are never called to the bar to hear the evidence.

Hale only says that the grand jury is to return the bill "a true bill;" or "*ignoramus*," they cannot say that the killing was *se defendendo*, 2 H. H. P. C. 157, 158, 159.

In *Burr's case*, the instructions prayed, went only to the admissibility of evidence, and were mere abstract propositions of law. The Chief Justice did not give the instructions as prayed, but only as to the admissibility of the evidence, and said, that it must be given to the grand jury in general terms; and that it must be different from instructions to the petit jury. Robinson's Report of Burr's trial, p. 56, 172, 174, 175, 177, 190, 197, 199, 202, 203, 205.

Such a proposition as this was never made to the worst of English judges in the worst of times. It is not necessary, as contended by the counsel of the United States.

The charge by the United States against the grand jury is, that they mistook the law, in refusing to find the indictment which charged forgery, *eo nomine*; and the proof is, that they found the other indictment which does not, in terms, charge a forgery. The United States acquiesced in the return of *ignoramus* upon the first, by sending up the second. The time to object was when the first indorsement was returned, and before they sent up the second. If the jury was of opinion that the offence was not, under all the circumstances, forgery, they did right to reject it; and they found the second indictment because it did not charge forgery, but some other offence. They had a right so to suppose.

He will not now argue upon the merits of the instruction prayed. The present question is only preliminary; namely, whether the Court will give any instruction at all. It is a

motion *ex parte*. The prisoner is not yet before the Court, for he is not now charged judicially, before this Court, with any offence, and therefore has no right to appear; and if any thing is said by us in his behalf upon this motion, it is *ex gratia*, and as *amici curiæ*. To go into the merits of the instruction would be to forestall the trial, and anticipate the opinion of the Court. Upon the merits of the question, the Court is not committed.

It does not follow that the jury mistook the law because they found one of the indictments, and rejected the other. He does not mean to discuss the merits of the instruction; but, in order to constitute any offence does it not require some inferences of fact from the facts stated in the indictment, which inferences can only be made by the jury.

It is conceded by the United States, that the altered instrument must be a paper by which the United States might be defrauded; but whether it be such a paper is a fact which must be found by the jury, and they have supposed circumstances in which it might happen that they might be defrauded by it; but those circumstances ought to be stated in the indictment.

One indictment rejected by the grand jury puts an end to the prosecution of that offence for that term, and the Court will not suffer a new indictment to be sent up to the grand jury, at the same term, if the rejected indictment was a good one. There is no instance in which the court has instructed the jury to find a bill which they rejected, after it has been returned and recorded. 4 Bl. Com. 308; 1 Chitty, 314, 315; 3 H. 7, c. 1.

Mr. Coxe, on the same side, contended that by giving the instruction the Court would prejudicate the whole case, and deprive the defendant of the benefit of a demurrer, by deciding, upon an *ex parte* hearing, that the indictment was good in law as an indictment for forgery. That the grand jury did not misunderstand the law. They supposed the first was an indictment for forgery, and therefore refused to find it. They supposed the second was not an indictment for forgery, and therefore they found it. In these opinions they have been sustained by the judgment which the Court has pronounced upon the second indictment.

Mr. Swann, Attorney for the United States, in reply, contended that the Court had the same power over the grand, as over the petit jury, and the same right to instruct them as to the law of any case before them. Suppose some great and unexpected crime should be committed during the sitting of the Court, not noticed in the general charge, could not the Court instruct them as to the law of the case, in a supplemental charge?

If they should find a bill for murder, without the word "*mur-*

dravit," the Court would instruct them to insert that word in the indictment, and this may be done at the instance of the United States Attorney. So in the present case, the grand jury have found all the facts which amount to forgery; and as the Court has decided that the word "forged" is necessary, they will order the grand jury so to find it.

CRANCH, C. J., delivered the opinion of the Court (THRUSTON, J., dissenting,) upon the motion to instruct the grand jury.

The counsel for the United States have moved the Court to instruct the grand jury, "that the facts and intents, found by them in the indictment, which was decided by the Court to be insufficient because it did not use the word "forged" or "counterfeited," constitute in law, the offence of forgery at common law; and that if they find, in a bill of indictment, all the facts and intents necessary to constitute a legal offence, they are bound to call the offence, in the indictment, by its legal and technical name."

The circumstances which have led to this motion are these. In the early part of this term an indictment was found against the present defendant, for a fraud upon the United States, by means of false pretences, in a transaction with Mr. Harris, a navy agent at Boston. That indictment was, upon demurrer, adjudged insufficient, for want of proper averments in regard to the pretences used. Among those pretences was an allegation of the same facts, relative to the alteration of the abstract B., which, with the addition of the words "forge and," before the word "alter," constituted another bill, which was afterwards sent up to the grand jury, and returned "*ignoramus*." This bill being thus returned, and filed in the court, the counsel for the United States sent up to the grand jury another bill exactly like it, but leaving out the words "forge and," before the word "alter," which the grand jury returned "a true bill;" the only difference between the two bills being, that the former charged that the defendant did "falsely and fraudulently forge and alter" the abstract; and the latter, that the defendant did "falsely and fraudulently alter" the abstract. Both averred the intent to defraud the United States. This latter indictment the Court adjudged to be insufficient, because it did not use the word "forge," or the word "counterfeit."

It is stated, in argument, by the counsel for the United States, that when the bill, which used the word "forge," was sent up to the grand jury, the indictment for defrauding the United States by false pretences, which the Court had, upon demurrer, adjudged to be insufficient, was also sent up, in order to show the grand jury that they had already found all the facts

stated in the indictment for forgery, although they had not used the word "forge." The grand jury, after consultation, informed the attorney of the United States that they could not find the bill with the word "forge" in it, and wished to know whether they might strike it out; to which he replied that they could not alter the bill, but must find or reject it as it was. That, in his opinion, the facts stated in the indictment amounted to forgery at common law, and would justify them in finding the bill as it was sent to them; and, that if they were not satisfied with this opinion, they had better ask the advice of the Court. They said they were willing to find the bill without the word "forge." To which the attorney replied, that if they did not agree to find the bill as it was, he would send them another exactly like it, but omitting that word, and the Court would decide whether the facts amounted to forgery. The grand jury, without asking the advice of the Court, returned the bill, containing the word "forge," *ignoramus*; upon which the other bill, which omitted that word, was sent up, and the grand jury returned it "a true bill." Upon long argument and great deliberation, the Court, upon demurrer, decided that it did not charge the offence with sufficient legal precision, because it did not aver, in express terms, that the defendant "forged," or "counterfeited," the abstract. But the Court did not give any opinion upon the question, whether the facts stated in the indictment did, in law, constitute the offence of forgery at common law. Whereupon the counsel of the United States made the motion to instruct the grand jury, which is now the subject of consideration, and which, at the request of the Court, they reduced to writing, in the following terms, namely —

[Here the Chief Justice read the motion in the words before stated, and proceeded —]

It will be perceived that this is, in effect, a motion to the Court to send back to the grand jury an indictment, which the same grand jury had, some days before, at the same term, returned "*ignoramus*," with an instruction that, if they should find the facts stated in it to be true, they should return it a true bill.

Such a motion is certainly unprecedented in this Court, and no case has been found, even in the acts of the most arbitrary of the English judges, in the worst of times, which could justify the Court in giving the instruction asked, in the particular circumstances of this case. On the contrary, in 3 Hargrave's State Trials, 152, it appears that Ch. J. Scroggs, Ch. J. North, Mr. Justice Jones, and Mr. Baron Weston, were impeached by the House of Commons, in 32 Car. 2; and one of the charges against them was, that they had discharged the grand jury

before they had finished their business, because they had asked the court to present their petition to the king, praying him to call a parliament. Yet the counsel for the United States contend, that if this Court should be of opinion that the grand jury refused to find that bill, from an unwillingness to convict the accused of the crime of forgery, the Court ought to discharge this grand jury, and hold the party bound to answer to another, which should be immediately summoned.

The opinion of the Chief Justice of the Supreme Court of the United States, in the case of Colonel Burr, has been cited in support of this motion. But the motion in this case is far more extensive than the motion in that; and the instruction now asked goes far beyond that which was actually given by the Chief Justice.

There, the instructions prayed were confined to the admissibility and competence of evidence in general. Here, they extend to all the particular facts charged in the bill, as constituting an offence.

To give this instruction, therefore, is to prejudge the whole question, which would arise upon a demurrer to the indictment.

There, the opinion actually given, extended only to papers of a certain description, which might, possibly, be offered as evidence to the grand jury. Robertson's Report of Burr's Trial, vol. 1, p. 202. Here, it is not confined to the admissibility or competency of the evidence, but takes in the whole merits of the case, upon the particular facts alleged in the bill.

There, the motion was originally made immediately after the Chief Justice had delivered his general charge to the grand jury, at the opening of the court, and before any bill had been sent up; and the instruction was given while the bills were pending before the grand jury. Here, the instruction is prayed after the grand jury have acted upon the case, and returned the bill *ignoramus*.

There is, therefore, no similarity whatever in the circumstances of the two cases, except that the prayer for instruction did not, in either case, come from the grand jury themselves.

There is no doubt that this Court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the Court, perhaps, may be bound to give it, if it be such an instruction as can be given without committing the Court upon points which might come before them on the trial in chief. This is the utmost extent of the *dictum* of the Chief Justice, in the trial of Colonel Burr; for he there said — "That it was usual, and the best course, for the court to charge the jury generally, at the commencement of

the term, and to give their opinion upon incidental points as they arose, when the grand jury should apply to them for information; that it was manifestly improper to commit the opinion of the court on points which might come before them, to be decided on the trial in chief; that he had generally confined his charges to a few general points, without launching into many details. One reason was, that some of the detailed points might never arise during the session of the grand jury, and any instructions on them would, of course, be unnecessary; another was, that some of these points might be extremely difficult to be decided, and would require an argument of counsel, because there was no judge or man who would not often find the solitary meditations of his closet very much assisted by the discussions of others; that he would have had no difficulty, however, in expanding his charge, if he had been particularly requested to do it, if he could have anticipated any necessity for it; and that he would have no difficulty in giving his opinions, at this time, on certain points on which he could obtain a discussion by counsel, provided he did not thereby commit his opinion on the trial in chief." *Burr's Trial*, vol. 1, p. 174.

When an instruction to a grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the Court to give the instruction or not; and, in exercising that discretion, they will take into consideration all the circumstances under which the instruction is prayed, and the extent of the prayer.

The counsel for the United States, however, have contended, that whenever the Court shall perceive that the grand jury have erred in matter of law, by rejecting a bill which they ought to have found, and it is presumed that their doctrine includes also the finding a bill which they ought to have rejected, the Court ought to instruct them as to the law, if asked so to do by either party. But to what purpose should the Court instruct them after they have acted upon the case, and found or rejected the bill, unless a new bill should be sent to them for the same offence, by means of which they could correct their mistake? This is now proposed by the counsel for the United States to be done, by sending up to the same grand jury a new bill, exactly like that which they have rejected.

This is, in effect, to return them the same bill. But this is contrary to the well-established immemorial usage of courts in England and in this country. The usage is stated by Sir W. Blackstone; who says, that when the bill is returned "*ignominus*," or "not found," the party is discharged without further answer; but a fresh bill may afterwards be referred to a subse-

quent grand jury. Vol. 4, pp. 305, 308. It is also stated by Archbold, (Crim. Pl. 34,) ; by Chitty, (1 Cr. L. 325,) and by other elementary writers ; and, after a diligent search, we have found no case, nor *dictum*, to the contrary. Nor have we found any case in which it has been decided by a court, either in this country or in England, that the grand jury should be discharged because they had found or rejected a bill, contrary to the instruction of the court, and a new grand jury, for that reason, summoned to attend at the same term. The usage is supported by the same principles which support the trial by jury ; for of what value would the trial by jury be, as the "palladium" of personal liberty, unless the jury should be independent, and could give their verdict, especially in criminal cases, freely and according to the dictates of their consciences ? Sir William Blackstone says, that the trial by jury is the grand bulwark of an Englishman's liberties.

"The antiquity and excellence of this trial, for settling of civil property," he says, "has been before explained at large ; and it will hold much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown." "The founders of the English law have, with excellent forecast, contrived that no man shall be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury ; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should be afterwards confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make,) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient,) yet, let it be again remembered, that delays and little inconveniences, in the forms of justice, are the price that all free nations must pay for their liberty in more substan-

tial matters ; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution ; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

And Sir Matthew Hale, (2 H. H. P. C. 160,) says — " But, in my opinion, fines set upon grand juries by justices of the peace, oyer and terminer, or jail-delivery, for concealments or non-presentments, in any other manner " than by another inquest, under the statute of 3 H. 7, c. 1, " are not warrantable by law ; and although the late practice hath been for justices to set fines arbitrarily, yea, not only upon grand inquests, but also upon the petit jury, in criminal cases, if they find not according to their directions, it weighs not much with me, for these reasons :

" 1. Because I have seen arbitrary practice still going from one thing to another. The fines set upon grand inquests began ; then they set fines upon the petit juries, for not finding according to the directions of the court ; then, afterwards, the judges of *Nisi Prius* proceeded to fine juries in civil causes, if they gave not their verdict according to direction, even in points of fact.

" 2. My second reason is, because the statute of 3 H. 7, c. 1, prescribes a way for their fining, which would not have been if they had been arbitrarily subjected to a fine before.

" 3. It is of very ill consequence ; for the privilege of an Englishman is, that his life shall not be drawn in danger, without due presentment or indictment ; and this would be but a slender screen or safeguard, if every justice of peace, or commissioner of oyer and terminer, or jail-delivery, may make the grand jury present what he pleases, or otherwise fine them."

The principal value of a grand jury, as a protection to the personal liberty of the citizen or subject, consists in the independence of the jurors. That independence, in order to be valuable at all, must be such as to prompt and enable them to oppose or to disregard what they may deem the arbitrary and illegal instructions of the court ; and to render that independence available, the right of a grand jury to find or reject a bill, without assigning any reason therefor, and thereby to take upon themselves the decision of both law and fact, must be maintained inviolate, however true it may be, in theory, that *ad quæstionem juris non respondent juratores*.

And the same principle is applicable, with equal force, to the right of the petit jury to find a general verdict in criminal cases.

So strongly has this principle been adhered to by the people of England, that not a case, it is believed, can be found among

the decisions of the most arbitrary judges, in the most turbulent times, in which a new trial has been granted in a criminal cause, because the verdict of acquittal was against the plainest evidence, and the most positive instruction of the court in matter of law.

Hawkins (B. 2, c. 47, § 11, 12,) says: "It hath been adjudged that if a jury acquit a prisoner of an indictment of felony, against manifest evidence, the court may, before the verdict is recorded, but not after, order them to go out again and reconsider the matter; but this is, by many, thought hard, and seems not, of late years, to have been so frequently practised as formerly." "However, it is settled, that the court cannot set aside a verdict which acquits a defendant of a prosecution properly criminal, (as it seems they may a verdict that convicts him,) for having been given contrary to evidence, and the directions of the judge."

If a verdict of acquittal, found upon consideration of the evidence on both sides, is thus peremptory and intangible, *à fortiori*, should the return of "*ignoramus*," by a grand jury, upon consideration of the evidence on the part of the prosecution alone, be equally sacred; at least during that term.

This rule, which we think as well settled as that in respect to the verdict of the petit jury, seems to us to render it improper that we should now give the instruction which is asked by the counsel for the United States.

But there are other reasons why we should not give it, some of which have been before intimated. One is, that the instruction extends to the whole case as stated in the bill, and is, in effect, an instruction that the bill, if found, will be a sufficient indictment, in law, to charge the defendant with the crime of forgery at common law; thereby forestalling the opinion of the Court upon all questions of law which might arise on demurrer. Such a commitment of the opinion of the Court, upon points which may arise in a subsequent stage of the prosecution, we consider, (to use the language of the Chief Justice of the United States,) to be "manifestly improper."

Upon this subject Lord Coke, in his 3d Institute, p. 29, has the following observations:

"And to the end that the trial may be more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinion beforehand, of any criminal case that may come before them judicially." "And therefore the judges ought not to deliver their opinions beforehand upon a case put and proofs urged on one side, in the absence of the party accused." "For how can they be indifferent, who have delivered their opinions beforehand

without hearing of the party, when a small addition or subtraction may alter the case? And how doth it stand with their oath who are sworn that they should well and lawfully serve our lord the king and his people, in the office of a justice, and that they should do equal law and execution of right to all his subjects." And again, in the next page he says: "The king's learned counsel should not, in the absence of the party accused, upon any case put, or matter showed by them, privately pre-occupate the opinion of the judges."

But upon a point so clearly supported by the principles of natural justice, it is needless to state authorities. Another reason why the Court should not give the instruction, is, that it is a very debatable question whether the facts stated in the bill which is now proposed to be sent up, or rather sent back, to the grand jury, do, in law, constitute the offence of forgery, at common law. Much may be said, and much has been said, on both sides. The Court did not find itself obliged to decide that question upon the former argument, and therefore declined. For the same reason it declines now. These reasons for not giving the instruction, it will be perceived, are equally valid, whether the grand jury did or did not, act under a mistake of the law. That question, the Court does not undertake to decide in this stage of the prosecution, for the reasons before stated.

For the same reasons the Court deems it to be its duty to refuse to instruct the grand jury as prayed by the counsel for the United States. See 1 Chitty Cr. Law, 696. Judges not to give their opinion prematurely.

THRUSTON, J., dissented from the opinion of the Court, as follows: This is a motion on the part of the counsel of the United States to instruct the grand jury in the following terms: (Here the judge read the motion in the terms before mentioned.)

The prosecution presents very extraordinary incidents which have occurred in the various efforts of the prosecutors to reduce their charges to legal forms, so as to present some specific charge which may put the accused on his trial before a jury of his peers. Among the numerous bills of indictment which have been preferred, and found by the grand jury, not one has had sufficient technical precision to stand the test of the touchstone of the law. They have been found, in the opinion of the Court too inartificially drawn up, and therefore, not sufficient to compel the accused to deny the charges, and submit to trial. They have been all, therefore, upon demurrer, deemed insufficient and invalid.

But, notwithstanding, I have seen in every one of those indictments sufficient evidence of crime imputed to the accused,

although their forms have been defective. I have seen substantial evidence of gross frauds against the public, and, (as at present advised,) of forgery at common law. Two distinct charges have been attempted to be preferred against the accused; the one for fraud, the other for forgery. The one for fraud has been divided into, I think, three independent grounds of accusation; for fraud committed in transactions with certain navy agents at different times. So that though there are as many as three grave charges against the accused, supported by such facts and intents, found by the grand jury, as satisfy the Court that the accused ought to be put to answer them, yet, in some six or seven weeks spent in disquisitions on technical niceties, we have not advanced one inch, but are brought by the *ambages* of the law, after a six weeks' tour through fields and wastes of thorny subtleties, to the point from which we started; and yet it is remarkable that all those indictments have been deliberately prepared by two distinguished and learned counsellors; and although, to my conception, they exhibited to the accused, in every instance, according to common sense, and common understanding, manifest and clear information of the crimes imputed to him, so as to enable him to know how to defend himself; which is, I believe, the only essential matter required by the law as regards certainty and precision in indictments; yet they were deficient in legal intendment; the averments were wanting, or wanting in the right place, or were inartificially made, a fatal *as*, in one instance infected the averment, and defeated the charge of false pretences. In a second indictment for fraud at common law merely, without false pretences, I had the misfortune to differ from the two other judges; and after all that I have heard, I am still at a loss to discern in what it was deficient; but it has been so ruled, and I bow with deference to the judgment of the Court. In the next indictment for forgery, where I was one of the majority of the Court, the indictment failed because the word "forged" was wanting. Now, at this moment, after further reflection, I am not clear that I was right in deeming this word so essential in a charge of forgery, that it cannot be dispensed with and supplied by what may be supposed equivalent words. But I considered it one of those, of which there are a number well settled, that no paraphrase will do where there are no equivalent words, as there are none for that very classical and elegant word, "*murdravit*," in an indictment for murder. I have heard from very good authority, that learned lawyers have differed in opinion as to the judgment of the Court on this indictment; some maintaining the word "forged," in an indictment for forgery, to be indispensable; others holding to the contrary. I said I was not

clear that I was right in the opinion I gave as to the word "forged," and what judge can be clear in such niceties? I thought, however, I was right as the law now stands, and so I gave my opinion. And as to distinct and clear perceptions of law, on points of special pleading, or indeed, almost any other points, founded on common law, and the decision of courts, and not on statutory enactments, (laying aside those great departments of the law which define the general rights of persons and things, and are, perhaps, reasonably definite and settled,) few judges will have the boldness to assert that they are fortunate enough to entertain them. Advance into the intricate fields of practice, of special pleading, of the innumerable cases growing out of *nisi prius* trials, and what perplexities occur? And where is the law, in these latter branches to be found? In thousands of books daily issuing from the press, in reports, treatises, and elementary writers, of which we have bales and boxes flowing in from England, and from the State courts of twenty-four States, from the Supreme Court, from the Circuit Courts of the United States, which far surpass all human power to read and understand; and if they could be read and understood, they are beyond the means of any judge to procure. There is not a term of the Court in which I am not surprised with some new book brought forward as authority, I never heard of before; they have supplanted the good old authorities and reporters which I was familiar with in my younger days, and which one seldom hears cited now. These multiplied instruments of puzzling and perplexing a court, in the hands of ingenious counsel, afford, I trust, an apology for judges who hesitate or doubt on difficult cases, inasmuch as, from the very nature and character of language in general, the indefinite meaning of words, and more especially from the discrepancy that necessarily must exist between any case pending before a court, and any other adjudged case, in circumstances and incidents, it is a very difficult matter to discern when a precedent appears to it, and when not. It may truly be said, therefore, that nothing is more uncertain than the law; if it were not so, how do those frequent reversals occur in the appellate courts, of the decisions of the most learned judges? Among the most renowned jurisconsults in the United States, was a reverend gentleman who was considered as the most learned man of his day, as well as the most eminent lawyer, and whose name is to be found among the distinguished patriots who asserted our independence, and signed its charter; and since this gentleman became a judge or chancellor of Virginia, his opinion on law matters was deemed infallible, yet no judge ever had the misfortune to meet with more

reversals of his decrees, so that he was at length driven to publish a book in vindication of his opinions. A rare book, but which I once met with, and was greatly amused with his acrimonious strictures on the appellate court. If such be the fate of so great a man, shall we not be excused, if we have been mistaken? and more particularly as we have crude points growing out of the most intricate branch of the law, namely, special pleadings? Now if two learned counsellors have not been able to frame one single indictment, (out of a number, some six or seven,) which has stood judicial scrutiny, it affords a proof that this department of the law is exceedingly unsettled and doubtful, and yet, let any man, not learned in the law, take any one of these indictments, and be asked if he does not clearly discern the nature of the accusation, and if it does not afford a satisfactory notice to the accused, of the offence with which he is charged, and I think he would answer affirmatively—the common sense and legal sense are at variance. Then, if I had the power, I would do away with all this artificial logic and reduce pleading and all judicial proceedings to more plainness and simplicity. Now, suppose instead of all the forms, averments and intents required, it seems, in an indictment for forgery, that now subsist, such an indictment as the following, merely by way of example were substituted: A. B. you are indicted for forgery in making certain alterations, with a fraudulent intent to defraud the United States, in a certain abstract returned by — Harris, navy agent, and which abstract is in the following words (here insert it,) which alterations are as follows, you erased the words, &c., &c. Now will any man say he would not have sufficient notice, from such a statement, to enable him to defend himself? Take a civil case, trover for instance, instead of those foolish fictions and falsehoods of the loss of the horse by the plaintiff, and the finding him by the defendant, the plaintiff were to file his declaration in the following words: I have sued you for a horse (here describing him,) which you have in your possession, and which I claim to be mine. Or a note of hand; I have sued you on a note of hand, a copy of which here following, (insert a copy of the note.) And so, or some such simple but clear exposition, of the cause of action in every case.

Shall I be deemed to have travelled out of the line of my judicial functions in suggesting these evils of our present system, and the advantages of some legislative correction of them? They have been for a long time forcibly pressed on my mind and I have been tempted, from the six or eight weeks' discussion of the subject, in the case of Mr. Watkins, to give vent to them. We have the example of a very eminent lawyer in England,

who has taken up the matter there, and suggested many beneficial clauses in the laws; but he took care to withhold his good until he had made his fortune, and reaped the golden harvest of the existing vicious system. Let not these few cursory observations subject me to the criticisms of the gentlemen of the long robe. I pretend not to be able to suggest a corrective of the evils of such deep root and long standing. I hope some abler hand will do this. I know they are evils of great magnitude, and vast injury to society. It would not avail now to add more on this topic, and it is time to take up the consideration of the question before us.

We are asked to instruct the grand jury, "That the facts and intents" in the indictment (which the Court adjudged not sufficient as an indictment for forgery for want of the words "forged," and "counterfeited" as one of those,) amount to the crime of forgery at common law; "and that the grand jury if they find in a bill of indictment all the facts and intents necessary to constitute a legal offence, are bound to call the offence in the indictment, by its necessary legal and technical name."

It is with much solicitude that I enter on the examination of this proposition, because it is one of those cases in which we have few lights to guide us; that is of rare occurrence and precedents are hardly to be met with. The first point to be considered is, do the facts and intents, found by the grand jury in the two indictments, the one which was returned by the grand jury "*ignoramus*," where the word "forged" was inserted; and the second returned "a true bill" where that word was wanting, but which were identical in every other respect, amount in law, to forgery at common law? Now this point was fully argued on the demurrer to the indictment; but the Court having adjudged it lost for the want of the word "forged," refused to give an opinion on any other point. I was, myself, willing, at that time, to have given an opinion; nor did I see any just ground to refuse to do so; but I acquiesced in the judgment of a majority of the Court.

I now pronounce my opinion, that the facts and intents, so found, do amount to forgery at common law. In East's Crown Law, vol. 2, p. 859, the writer says it was never doubted that forgery, at common law, extended to the falsification of records and other instruments of a public nature; and, after a review of the opinions of the most respectable authorities, as to what private instruments there may be forgery of, at common law, concludes the paragraph, p. 861, with these words — "but the following case has now settled the rule," that the counterfeiting of any writing with a fraudulent intent, whereby another may be injured, is forgery at common law.

The case alluded to is *Ward's case*, reported in 2 Lord Raym. 1461.

It was not contended, in the argument, that the abstract set out in the indictment, of (as) a public instrument, was not one of which forgery might be committed; it was declared only that it was (not) a public instrument. It behooves us, then, to consider the character of this paper. A navy agent is a public officer, into whose hands large sums are confided, to be disbursed for the public service. An abstract is, as far as I understand it, a condensed statement of those disbursements, returned to the proper accounting officers of the Treasury Department, and there filed, as the account of the agent of those disbursements; the public is a party to it; it informs them how the money, intrusted to the agent, has been employed; and, if this be so, why is it not an instrument of a public nature? But admit the paper not to have been a public paper, but a private one; suppose it to have concerned the interests of the Navy Agent only. A material alteration of an instrument of this sort, according to *Ward's case*, would be forgery at common law; and then the alteration might, perhaps, have been alleged to injure the agent, because it would have the effect of preventing his obtaining a credit with the government for the moneys paid to the drafts of the accused. Whether the government would, or will, give the agent credit for those moneys or not, is immaterial. The agent may, certainly, it appears to me, be prejudiced by this alteration. But however that may be, it is of no importance if the instrument be of a public character; of which, it seems to me, there can be no doubt.

It remains to be considered, whether or not the public may be injured or prejudiced by this alteration. And surely they may be, and, indeed, have been injured by it. Has not their money been withdrawn from public purposes, its true destination, and gotten into the hands of an individual, for private purposes? This is unquestionable. Now this took place in 1827, and was not detected until 1829. Why? Because the items, charging that money to the accused, were obliterated. They could not, therefore, have the means of calling their agent to account for it. Then, whatever may have been their ulterior views, as to making the agent responsible for this misapplication of public funds in his hands, they have been deprived of the means of doing so for a year and a half. If the accused be responsible, they have equally been deprived of the means of calling him to account. If this be no detriment, or prejudice, then the public not only may have been, but actually have been, prejudiced by this alteration, or falsification of the abstract. In fact, their money is

gone, and it is no argument that the Navy Agent is responsible for it. If my check on the bank is forged, is it less a fraud, on me, that if the money be paid on such forged check, I may recover it of the bank? Then the instrument is one susceptible of forgery, and the public may be prejudiced, and the alteration of it in a material part is forgery.

Now for the averments and intents. The alteration is charged to have been falsely and fraudulently made, with intent to defraud the United States. Here there is charged falsification, or alteration of a public instrument, in a material part, with sufficient averments and intents, and this constitutes forgery; and the charge in the indictment, as laid, amounts to forgery, but the technical words, "forged" or "counterfeited," are wanting; and although the charge in the indictment amount to forgery, yet is the indictment not good for want of those, or one, at least, of those technical words.

The only, but indeed the most difficult and momentous question, which now remains to be considered is, — Shall this Court instruct the grand jury, that they should supply or insert those words; or, in the words of the instruction, call the offence in the indictment by its necessary, legal, and technical name?

We have been warned that this proposition leads us into almost untrodden ground. That the provinces of the court and grand juries are so distinct, that we must not, unadvised, invade their sanctuary. That supplemental charges are rarely made, and only on genuine and abstract topics. That we are now called on to give a specific instruction in a particular case.

I confess I am in great perplexity, from the novelty, as well as the great importance of the proposition. But all that is left for us, in the dearth of precedents, is to try the question by the touchstone of reason, with such lights as the few cases cited afford; of which, perhaps, the strongest are reflected by the observations of the enlightened chief judge in *Burr's trial*, and to which I shall confine myself.

Instructions to grand juries, after their retirements, are of very rare occurrence, from the nature and character of their institution. The court can never be informed that the grand jury desires their advice, unless they themselves suggest it. And, as indictments are generally prepared by learned counsel, few cases occur, of informality or inaccuracy, in the technical part of the instrument. It can rarely happen that an application can be made to the court, to supply any formal defect in the bill, after it is returned into court. Hence, perhaps, the want of precedents. Instruction to petit jurors, at the instance of either party, is of every day's occurrence; and, on principle, it

is not easy to discern the difference between an instruction to a petit and a grand jury, except what grows out of the organization and the peculiar character of each of those tribunals. In trials before the court, by petit juries, the judges hear all the evidence and the case set out in the declaration. They have it all before them, and never refuse to instruct, if required by either party, on the law of the case; leaving the facts exclusively to the consideration of the jury. But they hear nothing of the investigations before the grand juries; and, until the bill or presentment is returned, are utterly ignorant of what the jury are about. Then if a party, whose case is before the grand jury, or the Attorney for the United States, were to ask the court for instructions upon the facts, could the court grant instructions? Shall the party accused, against whom a bill is filed, ask the court to instruct the jury that certain facts, stated in the instructions prayed for, do not constitute, in law, larceny, or forgery, or robbery, or whatever charge the accused apprehends may be laid against him before the grand jury? Or, on the other, (hand,) shall the prosecutor ask the opposite, that such do amount to such or such an offence? Clearly, for obvious reasons, the court would reject such an application. They have not heard the testimony, and, therefore, cannot discern that the instruction prayed is founded on the facts of the case; nor that the grand jury desire information; and the court will not, unadvisedly, commit themselves on propositions connected with particular cases. The character and credit of the judge might be in jeopardy by such a proceeding. Hence it may well be asserted, as a general rule, that a court will not give supplemental charges to a grand jury, especially touching a case before them.

But, as to supplemental general charges, I do not see why a judge may not have the grand jury brought into court at any time, to supply an omission in his charge before their retirement. Suppose a judge had omitted to animadvert upon some particular statutory offence, which he is, by the same statute, required especially to call the grand jury's attention to, shall he not be permitted to supply this omission in a supplemental charge? Suppose he had omitted to notice some particularly prominent mischief, which required the corrective notice of the grand jury, shall he not, also, give a supplemental charge in this case? It seems to be as untenable a general proposition, that a court or judge ought not to make general supplemental charges, as that no circumstances can occur in which they can instruct and charge in particular cases; but instances of either character are exceedingly rare, and, therefore, the want of prece-

dents is considered as equivalent to a want of power. But as rare as precedents are, we have a notable one in the report of *Burr's trial*. Let us examine carefully the reasoning of the judge in that case; and, as whatever law opinion he has pronounced, ought, deservedly, to be of the highest authority, I shall take it for my guide, as far as it is applicable to the case before the Court.

I have not been able to find what charges the chief justice had prepared to give the grand jury, as it does not appear in the volumes submitted by the counsel to the Court, namely, Robertson's Report of Burr's Trial, vol. 1. But the chief justice says, in p. 175, that he had drawn a charge, and submitted it to Mr. Hay; nor does it appear, that I can find, that he ever gave his charge to the grand jury; but there does not seem to be any doubt that he would have given it, if subsequent events had made it necessary. From this proceeding, then, I understand that the chief justice was prepared to charge or instruct the grand jury, on a particular case before them, and before a bill was found, on points of law bearing on that case. I do not know, either, whether the prepared charge embraced all the points submitted to the court by Mr. Burr; but it is a fair presumption that it did, as the chief justice made no exception to any of them.

In p. 74, the chief justice says — "It was manifestly improper to commit the opinion of the court, on points which might come before them to be decided on the trial in chief." Not improper to charge or instruct, but to commit the opinion of the court. And, in p. 175, he says — "He would have no difficulty, at this time, in giving his opinions on certain points, on which he could obtain a discussion by the counsel," with a proviso, "still, that he did not thereby commit his opinion on the trial in chief." Then the chief justice had no hesitation to charge the grand jury, in a particular case before them, on certain points; and if the points are those stated in Burr's seven propositions, — and we have no reasons to suppose otherwise, — we see what they are. Now let us examine those, and see whether the instruction prayed for from this Court would be more a committal of our opinions on the trial in chief, than those would have been in that case.

If the instructions embraced those seven propositions, — and it is very reasonable to suppose they did, as they alone were prayed for of the court, and it is not to be presumed that the chief justice would volunteer instructions, — can any man read them and say, that, if not all, most of them might be the subject of contest on the trial in chief? Mr. Hay, in his objections

to them, intimates that they may be subjects of discussion which might consume much time; then they were not all self-evident propositions; and, if so, I cannot observe why they might not, if given in charge to the grand jury, be as much a committal as any other matter of law, for every one of those points might be disputed, and some of them successfully; for I can hardly suppose them all true, under all possible circumstances and modifications. But, perhaps, the chief justice's prepared instructions did not embrace all, or any of these points. But he certainly prepared and offered to give instructions. Could the chief justice mean, by not committing his opinion, that the instruction embraced only self-evident propositions? There are not many such in law, nor could an instruction be well needed on a self-evident point; but they could not be self-evident points, because the chief justice says, (p. 175,) he would have no hesitation in giving his opinions, at this time, on certain points on which he could obtain a discussion by counsel, provided, &c.; therefore they were not self-evident, but disputable points, and he would be sure to meet them again on the trial in chief.

What, then, is a committal of opinion? Does it mean an opinion given on a point, which cannot recur on the trial in chief? I should be glad to be informed what sort of point of law this could be. If the chief justice would not have met these points again, on the trial in chief, after this declaration of non-committal, I can only say that the counsel would have conducted their client's cause with very little astuteness, and that is not to be presumed. Nor can I hardly imagine a point, on which instruction can be given to a grand jury in a matter of law, touching a case before them, which may not be contested, and the opinion of the court required on the trial in chief. But it was urged by the defendant's counsel, who did not deny that instructions were given, that they were confined to the competency or admissibility of evidence; and what points are more disputed, or more difficult, often, of solution, than the competency of evidence? If a judge can instruct a jury on this point, I do not see why he may not on any other.

One word more, on the limitation which the chief justice establishes to instructions to be given to a grand jury; it is, "that thereby he did not commit his opinion on the trial in chief." As far as I can understand this limitation, it means this, that he will not anticipate opinions in this stage of the proceedings, which he may, afterwards, on more full and solemn argument and consideration, be exposed to the necessity of revoking on the trial in chief. There is good reason in this;

and if I could discern what points such might be, I should not hesitate to approve this limitation, and to be governed by it. At all events, however difficult it may be to characterize or generalize instructions, that may or may not be given, we shall, before we conclude, examine the instructions prayed in the case before us, and see how far a judge would commit his opinions on giving them; and I think I shall be able to show that no instruction could be well asked for, in which less hazard of committal could be incurred. Then it is manifest that, in the opinion of the chief justice, there is no impropriety in giving opinions or instructions to the grand jury in particular cases, then under examination by them; and, as to this, the chief justice uses strong language. He says, that he would have no difficulty in giving his opinions at this time. Now let us see what difference there was in the case before the chief justice, when instructions were asked from him, and the one before this Court, in which instructions are asked from us. In that case, instructions were asked and agreed to be given before any bill was found; the instructions, then, must have had an influence on the grand jury,—they must have been led by them. But, in the case before this Court, the jury have acted untrammelled, by their own light. They have found the bill. We are not asked to tell them what they might, and what they might not lawfully do; we are only requested to inform them of the effect, in law, of what they have already done, and merely to supply a matter of form; to give a legal name, in the language of the instruction prayed, to what they have done. Now, if the day shall ever come, (which may God avert from us,) when courts might be supposed corruptly to favor prosecutions on the part of the government, there might be some danger of their interfering with grand juries, while the party charged was under examination before them; because they might artfully lead them to find bills against innocent persons, and on frivolous accusations. When the bill is found, the jury have performed their office; the act is entirely theirs; they have not been directed, instructed, or influenced by the court.

I have already given my opinion as to the legal import and effect of the facts and intents found in the indictment before us. I have said that, in my judgment, they amount to forgery; and of this opinion, I believe, were the other judges, or, at least, I so understood them, although they refrained from pronouncing it. This point has been solemnly argued on demurrer; the character of the abstract was examined; it was denied, by the counsel for the accused, to be a public paper, and, therefore, not susceptible of forgery; and if it were, it was denied that, by

the alteration of it, the United States could be prejudiced. These points having been fully discussed, we were called upon to give an opinion on them. Now, as to these main points, no instruction is prayed for; we are only asked to instruct the jury that the bill found by them charges forgery. They are not, therefore, to do any thing more; not to act again on these points. The only thing they would be required to do, would be to supply a matter of form,—to call the thing by its right name. Now, in instructing the jury to do this, it is impossible we can commit our opinions; because the counsel for the accused can never urge that this word “forged,” if inserted in the indictment, can vitiate it. On the contrary, they argued that the indictment was bad without it. The question can never occur again, on the import and effect of this technical phrase.

It was argued, by the counsel for the accused, that if the Court should instruct the jury to insert the necessary technical words, it would be impeaching the integrity of the jury; inasmuch as it would be an insinuation that the jury had found the essence of the crime, but had refused to give it a name. God forbid that I should impeach the integrity of the jury. I would much rather applaud their diffidence, their reluctance to decide doubtful points of law,—points which have admitted of very long and able attempts of learned counsel at the bar, whether the facts and intents found amounted to forgery or not; and of this the jury might well doubt, and, therefore, might well hesitate to find the first indictment, where forgery was charged in all the forms of law. Without violating every principle of that comity, of that respectful consideration due from one tribunal of the same court to another, no other interpretation can be put on their doings in regard to these two bills.

But we are not driven to the necessity of resorting even to common courtesy for this interpretation; we have evidence of it. The Attorney for the United States informs us, “that when the first indictment was before the grand jury, they asked him whether they might strike out the word “forge,” and find the facts and intents alone. The attorney said no; he would prefer laying before the grand jury a new indictment, in the same words, without the technical word “forge,” and the Court might then decide whether the facts and intents set forth in the bill amounted to forgery or not.” These are the very words of the attorney. Now, as far as motives can be proved, does not this statement of the attorney come as near positive proof as may be, that the jury were influenced by doubts as to the legal character of the offence, growing out of the facts and intents found. He informs them they might so find the bill, and “the Court

might decide on the effect of the finding ;” they therefore found the facts and intents. Had the jury been influenced by improper motives, by any unwarrantable lenity towards the accused, they would hardly have discussed this matter with the Attorney for the United States. No other construction can be put upon their doings, than that they very laudably refrained from committing themselves on a doubtful point of law. But the attorney told them “the Court might decide ;” and thereupon they found the facts and intents. Decide what ? Why, the law, of which the jury were doubtful. Decide, for what purpose ? To inform the minds of the jury ? If so, it is a submission, through the attorney, of the law of the case to the Court ; and the Court ought, therefore, to decide it, and inform the jury of that decision. This, then, is tantamount to asking an instruction ; not, to be sure, through their foreman, but through their law adviser, the Attorney for the United States.

But suppose the attorney had permitted the jury to strike out the word “forged” in the first bill, and they had returned it a true bill, — and this, perhaps, would have been the most simple course of proceeding ; would not the Court, under the general authority given to them, when grand juries return presentments and bills into court, to “alter matter of form, not matter of substance,” have been bound, on inspecting the bill and finding that the facts and intents found amounted to forgery, to inform the jury of the fact, and that the word “forged” was a formal technical word, necessary to give a legal name to the offence ? It seems so to me. Suppose, in *Burr’s case*, the jury had found all the facts and intents necessary to constitute treason, and the chief justice, on inspecting the bill returned into court, had found the technical word *proditorie* wanting, would he not have been in the line of his duty in saying to the jury, — “Gentlemen, you have returned a good bill for treason, except in one word ; you have omitted the word *proditorie*, (or treacherously, in English.) It is a word sanctioned by immemorial use, and, therefore, indispensable in an indictment for treason ; be pleased to insert it. You have found the substance, but omitted a form.” I see no objection to such a proceeding. If this be the case, can the scruples of the attorney, as to the jury’s striking out the word “forged”, in the first indictment, and submitting a second to them, of the identical tenor of the first, without this word, alter the case ?

From the foregoing observations and reasoning, (if these remarks may be dignified with such a name,) I am led to the following conclusions. That we have the highest authority for saying that the Court may give general supplemental instructions

to a grand jury ; that they may go further and instruct them on points of law touching cases under examination before the grand jury and before the bill is returned by them ; and, *à fortiori*, on matters of law growing out of the indictment itself when found by the grand jury, that the only limit is, that the Court will not, in the exercise of this discretionary power, (not that they may not) commit their opinion on the trial in chief. That in instructing the jury that the word "forged" was a necessary form in an indictment for forgery, after they had found the essence of the offence, could not commit the opinion of the Court on the trial in chief, because it could never be the subject of future debate, inasmuch as the counsel for the accused themselves, maintained that this word was necessary to give effect to an indictment. That as to the essence of the offence found in the indictment in question, it is incumbent to inform the jury that it is forgery, or there must be a failure of justice, inasmuch as we have undoubted evidence of an offence having been committed, or, at least, the strongest probable cause for believing that it has been committed ; and unless we act on the case in the manner required of us, the offender, so far from being punished, if guilty, cannot even be brought to trial. That if, by this refusal of the Court to do what is required, there be a failure of justice, it is the strongest evidence that the Court cannot be right. That it is a solecism to suppose an offence of great moral turpitude, and of dangerous example, and evil to the community, can be perpetrated, and yet that the laws afford no means of bringing the guilty to atone for his offence. That it is of the utmost importance to the well being of society that whilst courts are protecting with jealous care the personal rights of individuals, they forget not their duty to the people and the rights of the community ; and, finally, that as I am of opinion that the facts and intents found in the indictment amount to the crime of forgery at common law, it is incumbent upon me under the circumstances of the case, and for the reasons assigned above, to tell the jury so, and that they ought therefore to give validity to their act, and sanction and vigor to the law, "by calling the offence in the indictment," (to pursue the language of the instruction,) "by its necessary, legal, and technical name."

The result of these opinions was, that the motion to instruct the grand jury was overruled.

Before that motion was made, namely, before the 25th of June, the grand jury had found three other indictments against this defendant, upon three separate transactions.

1st. The first was upon a transaction for \$750 with Mr. J. K. Paulding, Navy Agent at New York. It avers that the defend-

ant, T. W., was 4th Auditor of the Treasury of the United States, and as such required by law to receive all accounts accruing in the Navy Department, or relative thereto; to keep all accounts of the receipts and expenditures of the public moneys of the United States in regard to that department, and of all debts due to the United States, or moneys advanced relative to the said department; to receive from the Second Comptroller the accounts relative to the said department, which had been finally adjusted, and to prepare such accounts with their vouchers and certificates, and to record all warrants drawn by the Secretary of the Navy, the examination of the accounts of which is by law assigned to the said 4th Auditor; and to make such reports on the business of the said 4th Auditor as the Secretary of the Navy should deem necessary and require for the services of that department. It further avers that Samuel L. Southard was Secretary of the Navy of the United States, and as such had authority to issue requisitions to the Secretary of the Treasury of the United States, countersigned by the Second Comptroller and registered by the 4th Auditor, for moneys appropriated by law for the use of the Navy Department; whereupon the Secretary of the Treasury was authorized by law to grant his warrants on the Treasurer of the United States for the amounts, and according to the sums of the said requisitions.

That J. K. Paulding was a navy agent, residing in the city of New York, and was required by law to render his accounts to the 4th Auditor.

That on the 2d of March, 1827, an act of Congress, [4 Stat. at Large, 206,] was passed, making appropriations for the support of the Navy of the United States, in which the sum of \$20,000 was appropriated "for arrearages prior to the first day of January, 1827."

That the defendant, so being 4th Auditor as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to obtain and acquire for himself and for his own private use the money of the United States, with force and arms, on the 16th of January, 1828, at Washington county, in the District of Columbia, falsely and fraudulently wrote and addressed, and caused to be sent to the said J. K. Paulding, Navy Agent as aforesaid, in the city and state of New York, a letter in the words and figures following, to wit, (here was inserted the letter of the 16th of January, 1828, which was inserted in the first indictment which was quashed on demurrer, *ante*, p. 446.)

It then avers that the defendant drew the draft on J. K. P., Navy Agent in New York, for \$750, in favor of C. S. Fowler, at

one day's sight, and sold it to Mr. Fowler, and received therefor the sum of \$750, and kept and disposed of the same for his own use. That on the 16th of January, 1828, Mr. Paulding, as navy agent, wrote and sent to Mr. Southard, the following letter :

"Navy Agent's Office, New York, 16th January, 1828.

Sir: Be pleased to direct a warrant to issue in my favor for the sum of \$12,139.12, to be charged to the following appropriations, viz.:

Pay Aft.	\$1,942
" Shore Stations	1058.25
" Civil Establishment	643.32
" Repairs	2,488.54
" Medicines	1,000
" Increase	2,904.90
" Sloops of War	2,102.11
	————— \$12,139.12

required for the purposes expressed in the list herewith inclosed. I have the honor to be, very respectfully, your obedient servant,

"J. K. Paulding.

"Hon: Samuel L. Southard, Secretary of the Navy Department, Washington."

Which letter was received by Mr. Southard, at Washington, on the 19th of January, 1828.

That the said T. W., "being then and there 4th Auditor of the Treasury Department of the United States as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord one thousand eight hundred and twenty-eight, as aforesaid, at the County of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly, apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, to add to the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of seven hundred and fifty dollars, and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States as aforesaid, that the said sum of seven hundred and fifty dollars, was required for the use and service of the Navy of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the Navy Department prior to the first day of January, which was in the year of our Lord one thousand eight hundred and twenty-seven, and to cause the same to be placed

in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purpose aforesaid, at the same time, and together with the said sum of twelve thousand and one hundred and thirty-nine dollars and twelve cents, for which the said J. K. Paulding had required a warrant to be issued as aforesaid; and he, the said Tobias Watkins, did then and there unlawfully, fraudulently, deceitfully, knowingly, and designedly, cause and procure to be issued by the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, a requisition to the Treasurer of the United States for the additional sum of seven hundred and fifty dollars, and did cause and procure the said sum of seven hundred and fifty dollars to be added to the said requisition of twelve thousand one hundred and thirty-nine dollars and twelve cents, which he, the said J. K. Paulding had requested to be issued as aforesaid, and thereby caused the sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents to be included in the said requisition, instead of the said sum of twelve thousand one hundred and thirty-nine dollars and twelve cents, so required to be so issued by the said J. K. Paulding as aforesaid; which said requisition, so caused and procured to be issued as aforesaid, is in the words and figures following," (here was inserted the requisition verbatim, including the sum of \$750, under the head of "Arrearages prior to 1827,") which said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, in the said requisition mentioned, was, in conformity thereto, by warrant from under the hand of the Secretary of the Treasury of the United States, drawn out of the treasury thereof, and placed in the hands of the said J. K. Paulding, navy agent as aforesaid, the said sum of twelve thousand eight hundred and eighty-nine dollars and twelve cents, then and there being the property of the United States, with intent to defraud the United States out of the said sum of seven hundred and fifty dollars, in the said requisition mentioned and included as aforesaid, and by means thereof, and of the warrant of the Secretary of the Treasury issued thereon in manner aforesaid, drawn from the Treasury of the United States; whereas, in truth and in fact, he, the said Tobias Watkins, at the time of making the said false pretences, well knew that the said sum of seven hundred and fifty dollars, in the said requisition included, was not required for the use and service of the Navy of the United States, and that it was not necessary to draw the same from the Treasury of the United States, for the payment of claims settled and adjusted under the appropriation for arrearages due by the Navy Department of the United States prior to the first day of January, which was in the year one thousand

eight hundred and twenty-seven, nor to place the same in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purpose aforesaid; and whereas, in truth and in fact, he, the said Tobias Watkins, at the time of making the said false pretences as aforesaid, did not intend that the said sum of seven hundred and fifty dollars in the said requisition included, and, by means thereof, in manner aforesaid, drawn from the 'Treasury of the United States, should be applied to the use and service of the Navy of the United States, nor to claims settled and adjusted under the appropriation for arrearages due by the Navy Department prior to the first day of January, which was in the year one thousand eight hundred and twenty-seven, nor that the same should be placed in the hands of the said J. K. Paulding, navy agent as aforesaid, for the purposes aforesaid; but then and there intended fraudulently to defraud the United States of the same, and to convert the said sum of seven hundred and fifty dollars to his own use and benefit, and did thereby defraud the said United States of the said sum of seven hundred and fifty dollars, to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States. Thomas Swann, Attorney U. S."

2d. The 2d of the said three indictments was upon a transaction with Mr. Paulding for \$300, and had two counts. The 1st count states that the defendant, on the eighth of October, 1827, being 4th Auditor, &c., and intending fraudulently and unjustly to obtain and acquire to himself from J. K. Paulding, navy agent at New York, the sum of \$300 of the moneys of the United States in the hands of the said J. K. Paulding, "unlawfully, fraudulently, and deceitfully" wrote and caused to be sent to the said J. K. Paulding, navy agent at New York, the following letter, purporting to be dated and written from the office of the 4th Auditor, &c.

"Treasury Department, 4th Auditor's Office, 8th October, 1827. Sir: I have this day drawn on you in favor of Charles S. Fowler for three hundred dollars, which you will please to charge to 'Arrearages prior to 1827;' under which head a remittance will be made to you immediately on the secretary's return to the city. In the mean time be pleased to pay the draft out of any unexpended balance in your hands, to be replaced on receipt of the treasurer's remittance. I am, Sir, very respectfully your obedient servant, T. Watkins."

It then avers that the defendant drew the draft, sold it to C. S. Fowler, received the sum of \$300 and converted it to his own use; and that the draft was afterwards paid by J. K. Paulding out of the moneys of the United States in his hands.

“ And the jurors aforesaid, upon their oath aforesaid, do find that the said letter thus written and dated, and addressed and sent from the said Treasury Department and the office of the 4th Auditor thereof, purported to be and was fraudulently intended by said Watkins, to appear as an official letter of said Watkins, and was so written, dated, addressed, and sent to deceive the said Paulding by such appearance, and to induce him to pay the draft aforesaid, out of the moneys of the United States in his hands; and the said Paulding was so deceived, and did, in consequence of such deceit, so pay the same out of the said moneys of the United States in his hands.

“ And the jurors aforesaid, upon their oath aforesaid, do find that the letter aforesaid, so written, dated, addressed, and sent as aforesaid, purported to be, and was fraudulently intended by said Watkins to appear, and did appear, as an official letter of the said Watkins, and as representing that the said sum of money, therein mentioned, was to be paid for the public service of the United States, and that the draft, therein mentioned, was drawn on account of the public service of the United States, and to deceive the said Paulding by such appearance and to induce him to pay the same out of the moneys of the United States in his hands; and the said Paulding was thereby so deceived, and did pay the same out of the said moneys of the United States in his hands.

“ And the jurors aforesaid, upon their oath aforesaid, do find, that, at the time of writing, addressing, and sending said letter, and of making said draft, the public service of the United States did not require the payment of the said sum of money in the said letter and draft mentioned, and the said Watkins well knew the same not to be so required, and that said Watkins had no authority to draw for the said sum of money, or to write the said letter of advice on account of the public service of the United States, as an official letter of him, the said Watkins, 4th Auditor as aforesaid, and well knew he had no such authority; and that said Watkins wrote and dated, and addressed and sent the said letter, and made the said draft, ostensibly for the public service as aforesaid, but falsely and fraudulently for his own use and benefit, and to deceive the said Paulding as aforesaid, and to defraud the United States; and that by means of the said letter and draft, so written, dated, addressed, and sent as aforesaid, he, the said Watkins, did unlawfully, fraudulently, and deceitfully, obtain to and for his own use and benefit, the said sum of three hundred dollars of the moneys of the United States, from, and out of, the hands of the said Paulding, navy agent as aforesaid, to the great deceit,

fraud, and damage of the United States, and against the peace and government of the United States."

The 2d count stated, that the defendant, then Fourth Auditor, &c., intending to deceive and defraud the United States of the sum of \$300 of the moneys of the United States, on the 8th of October, 1827, having informed J. K. Paulding, Navy Agent at New York, by letter of that date, and dated "Treasury Department, Fourth Auditor's office," that he had drawn on him in favor of C. S. Fowler for \$300, to be charged to "arrearages prior to 1827," and that, under that head a remittance would be made to him immediately on the return of the Secretary of the Navy to the city, and desiring the said J. K. Paulding to pay the draft out of any unexpended balance in his hands, to be replaced on his receipt of the Treasurer's remittance, made the said draft and sold it to C. S. Fowler, and received from him therefor, the sum of \$300, and applied the same to his own use; which draft was afterwards paid by the said J. K. Paulding out of the moneys of the United States in his hands.

"And the jurors aforesaid, on their oath aforesaid, present that the said letter was written, and addressed, and sent, as aforesaid, fraudulently, and with the intent to impose on the said Paulding the belief that the said draft was made on account of, and intended to be applied to, the public service of the United States, and to induce him to pay the same, and with intent to defraud the United States. And that the said draft was fraudulently made and sold as aforesaid, with the intent that the same should be paid by said Paulding, under such belief and inducement as aforesaid, out of the moneys of the United States in his hands as aforesaid; and with the intent thus to obtain and apply to his own use the said sum of three hundred dollars of the moneys of the United States, and with intent to defraud the United States.

"And the jurors aforesaid, upon their oath aforesaid, present, that by means of the said letter so written, addressed, and sent, the said Paulding was imposed on to believe that the said draft was made on account of, and intended to be applied to, the public service of the United States, and was thereby induced to pay the same out of the moneys of the United States in his hands, and did, under such belief and inducement, pay the same out of the said moneys of the United States in his hands. And the said Watkins did, by said imposition and deceit, thus used and practised upon the said Paulding, and by the said letter so written, addressed, and sent as aforesaid, defraud the United States of the said sum of three hundred dollars, to the great

wrong of the United States, and against the peace and government thereof. Thomas Swann, Attorney U. S.:"

3. The third of the said three indictments was upon a transaction of \$2,000 with Mr. Hambleton, a purser in the navy of the United States at the navy-yard in Pensacola.

This indictment states that the defendant was Fourth Auditor of the Treasury of the United States, and recites his duties; that Samuel L. Southard was Secretary of the Navy, and had authority to issue requisitions to the Secretary of the Treasury for moneys appropriated for the service of the navy of the United States, whereupon the Secretary of the Treasury had authority to grant his warrants on the Treasury of the United States, for the amount of such requisitions. That Samuel Hambleton was a purser in the navy of the United States, residing at the navy-yard of the United States, at Pensacola. That the defendant, being Fourth Auditor, &c., "and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the 6th of March, 1827, at the County of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly write, address, and cause to be delivered to the said Samuel L. Southard, Secretary of the Navy, as aforesaid, a letter, in the words following, to wit:

"Fourth Auditor's Office, 6th March, 1827. Sir,—I will thank you to cause a requisition to be issued in favor of Purser S. Hambleton, for \$2,000, under the head of 'Pay Afloat,' made payable to my order, at the request of Mr. Hambleton, for the purpose of paying his drafts on me to that amount. I am, Sir, respectfully, your obedient servant, T. Watkins. The Secretary of the Navy."

It is then averred that, confiding in the said letter, and believing that the said purser had requested such a requisition to be issued for \$2,000, and that that sum was required for the use and service of the United States, Mr. Southard, as Secretary of the Navy, issued the requisition, as requested. That the said sum of \$2,000, in conformity with the said requisition, was, by warrant from the Secretary of the Treasury, drawn out of the Treasury of the United States, and placed in the hands of the defendant; "Whereas, in truth and in fact, the said T. Watkins, at the time he wrote his letter aforesaid to the said Samuel L. Southard, Secretary of the Navy, as aforesaid," "had not been requested by the said S. Hambleton, Purser, as aforesaid, to cause any requisition to be issued in favor of him," "payable to the order of him, the said T. Watkins, as aforesaid, for the said sum of \$2,000; nor had the said S. Hambleton drawn any

drafts upon him, the said T. Watkins, for the said \$2,000 ; and whereas, in fact and in truth, the said Tobias Watkins, at the time he wrote his letter, as aforesaid, did not intend that the said sum of \$2,000 should be applied to the use of him, the said S. Hambleton, Purser, as aforesaid, or to the use or service of the navy of the United States, or to the payment of any such drafts, as aforesaid, but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit ; and did, by means of the pretences aforesaid, defraud the said United States of the said sum of \$2,000, and did thereby then and there convert and appropriate the said sum to his own proper use and benefit, to the great damage of the United States, to the evil example of all others in like cases offending, and against the peace and government of the United States."

There was a second count in this indictment, containing the same preliminary allegations as in the first count, and averring that the defendant, "intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said sixth day of March, 1827, aforesaid, at the county aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States, as aforesaid, to cause a requisition to be issued on account of the said S. Hambleton, Purser, as aforesaid, for the sum of \$2,000, under the head of ' Pay Afloat,' to be paid to him, the said Watkins ; and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States, as aforesaid, that the said sum was required for the use and service of the United States ; and did then and there pretend that the said S. Hambleton, Purser, as aforesaid, had drawn drafts upon him, the said Tobias Watkins, to the amount of the said \$2,000, and that he, the said S. Hambleton, had requested the said requisition to be issued, for the purpose of meeting and paying his said drafts. And the said Samuel L. Southard, confiding in the statement and representation so made to him by the said Tobias Watkins, as aforesaid, and believing the said sum of \$2,000 was required for the use and service of the United States, and that the said S. Hambleton had drawn drafts upon him, the said Tobias Watkins, to the amount of the said \$2,000, and that he, the said S. Hambleton, had requested a requisition to be issued," &c., required a letter to be written by the said Watkins to him, the said Mr. Southard, Secretary of the Navy, &c., which letter (namely, the letter of March 6, 1827, set forth in the first count,) was written,

&c., and caused the said requisition to be issued, &c.; whereupon the Secretary of the Treasury issued his warrant to the Treasurer, &c., for the said sum of \$2,000, in favor of the defendant, whereby the said sum was drawn out of the Treasury of the United States, and placed in the hands of the defendant. "Whereas, in truth and in fact, the said sum of money, in the said requisition mentioned, was not required for the use and service of the United States; and the said Watkins, at the time he applied to the said Samuel L. Southard, to cause the requisition to be issued, as aforesaid, that is to say, on the said sixth day of March, 1827, well knew that the same was not so required for the use and service of the United States; and that the said Watkins had not been requested by the said Samuel Hambleton to apply to the said Southard, Secretary, as aforesaid, for any such requisition to be issued, as aforesaid; nor had the said S. Hambleton, Purser, as aforesaid, drawn drafts upon him, the said Watkins, to the amount of \$2,000; nor had the said Hambleton requested the said requisition to be issued, for the purpose of meeting and paying such drafts. And whereas, in truth and in fact, the said Tobias Watkins, at the time he made his said application for the requisition aforesaid, and wrote and delivered the letter, as aforesaid, did not intend that the said \$2,000 should be applied to the use of him, the said S. Hambleton, Purser, as aforesaid, nor to the use or service of the Navy of the United States, or to pay any such drafts of the said Hambleton; but then and there intended to defraud the United States of the same, and to convert the said sum of money to his own proper use and benefit; and did, by means of the false and deceitful means aforesaid, defraud the said United States of the said sum of \$2,000, and did then and there convert and appropriate the same to his own proper use and benefit; to the great damage of the United States, &c. Thomas Swann, Attorney, United States."

To each of these three indictments the defendant's counsel filed a general demurrer.

*Mr. R. S. Cox*e, for the defendant, observed that the objections which he should take would go to the gist of the transaction, and to the whole merits of the case.

His first objection was, that this Court has no jurisdiction of the case, whether sitting as a State court, under the adopted laws of Maryland, or, as a federal court, exercising the powers and jurisdiction of the other circuit courts of the United States.

In these indictments, every thing is alleged to have been done officially, and the offences charged are charged as official misdeemeanors.

In the former cases, the acts done were not charged as having been done officially.

These are cases of one officer of the United States imposing upon another officer of the United States, and obtaining the money of the United States. They are entirely and exclusively offences against the United States, as the government of the Union, in its federal and national character. The offence would have been the same, if it had been committed in any one of the States, instead of this district. It is a charge of violating his official duty, and employing his official powers and means to improper and private purposes. It is only a violation of his official duty; a breach of contract between him and his government. 2 Bl. Com. 108, Chitty's Ed.; Co. Lit. 232 b, § 378, 234 a.

The United States has no common law.

No State court can punish an officer of the United States for a violation of his duty, nor prevent or punish the destruction of the property of the United States, by any person. The Constitution of the United States provides for impeachment of the officers of the United States, and defines treason. And Congress has defined by law all the offences which can be committed against the United States, and provided for their punishment. Those offences must be in regard to those things of which the United States have jurisdiction; and those offences can be tried and punished only in the courts of the United States, — courts of purely federal jurisdiction.

Congress has made the office of Fourth Auditor, and has defined its duties; and has exclusive jurisdiction over the whole subject-matter of these indictments.

A man could not be punished in a State court, under any statute of a State, or under the common law of any State, for burning a navy-yard of the United States; nor could he be punished by the courts of the United States, because there is no statute of the United States to punish such burning. *McCulloch v. Maryland*, 4 Wheat. 411, 416. The Constitution must give Congress jurisdiction over the subject, and Congress must legislate upon it, before the courts of the United States can exercise jurisdiction over the offence, (or, rather, over the act done.) Whatever Congress have the power of prohibiting, and have not prohibited, is lawful, and cannot be made penal by a State law.

The federal jurisdiction, if it exists at all, is exclusive. The United States has a right and the power to protect itself, and to punish its officers for malversation in office. *Gibbon v. Ogden*, 9 Wheat. 17, 209; *Houston v. Moore*, 5 Wheat. 22. The nego-

tiation with Great Britain, respecting the suppression of the slave trade, failed upon the ground that the United States could not give power to the courts of another nation to punish the violation of the laws of the United States.

The judicial power must be co-extensive with the legislative; and *e converso*. The State courts cannot decide what are the duties of an officer of the United States. Why do these indictments aver the duties of the officer? Because the act done was a violation of official duty. Because, in order to show an offence, it was necessary to aver that the act was done officially. This Court, then, if sitting as a State court, could not decide these points. If this indictment had been found in a State court, and the defendant had contended that he had a right, by virtue of his office, to do the act, and the State court had decided against that right, the cause might have been removed to the Federal court under the 25th section of the Judiciary Act of 1789. *Cohen's case* was brought before the Supreme Court of the United States, because he claimed a right to sell the lottery ticket under an act of Congress. The defendant, in the present case, was arrested in Pennsylvania by the warrant of a district judge, because he was charged with an offence against the United States. See the Judiciary Act of 1789, § 33. This is one of the cases expressly stated by Mr. Justice Story in *Coolidge's case*, (1 Gall. 488,) as being within the exclusive cognizance of the federal courts. In the former opinion of this court, this was said to be an indictable fraud, because it was a fraud upon the United States—upon the public. But in a Maryland court it would not be a fraud on that public;—that public would be the State of Maryland—not the United States;—it would, therefore, not be an indictable fraud in Maryland. It could not be sustained in a State court by virtue of a law merely municipal, because it is an offence against the United States only. The judicial tribunals of one country will not enforce the municipal laws of another, especially the criminal laws; and in this respect the State tribunals and the United States tribunals are as distinct as the tribunals of different nations. They are, in truth, distinct sovereignties. In a prosecution under the State law, the executive of that State alone has the power to pardon. 1 Kent, Com. 301, 313.

The Constitution of Maryland was abridged by the Constitution of the United States, and when Congress adopted the common law of Maryland, it took it as it was modified by the Constitution and laws of the United States. The common law of Maryland never extended to offences against the United States. *The Militia case*, 5 Wheat. 17. By the Constitution

of the United States, the judicial power of the United States shall extend to all cases of law and equity arising under the Constitution and laws of the United States, and such jurisdiction, at least in criminal cases, is exclusive. *Martin v. Hunter*, 1 Wheat. 329, 330, 331, 333. *Cohen's case*, 6 Wheat. 381.

The Treasury, and the offices and officers of the United States, are the creatures of the Constitution and laws of the United States, and the right of legislation respecting them is exclusive. The laws of the United States can only be executed by the courts of the United States. *McCulloch v. Maryland*, 4 Wheat. 401; *Gibbon v. Ogden*, 9 Wheat. 196, 197, 209; *Commonwealth v. Thompson*, Virginia Cases, 319; *New Jersey v. Smith*, 1 South. Rep. 33; 1 Kent, Com. 312, Lecture 16.

What difference is made by the power of exclusive legislation over this district, given by the Constitution of the United States, Art. 1, § 8? If this Court could not, either as a State Court, or as a court of the United States, take cognizance of this case, how can it by the junction of the two jurisdictions? This clause of the Constitution operates no change; it only authorizes legislation. Neither the Maryland Act of cession of 23d of December, 1788, nor the Act of acceptance of July 16, 1790, nor the Act of February 27, 1801, changed the law. The laws of Maryland were to remain in force; no new offence was to be created by the change of jurisdiction; nothing was added to the list of crimes punishable by the laws of Maryland.

This offence, then, was not an offence against the State of Maryland, nor punishable by that law.

This Court, in its former opinion, has not decided this point, for the Court expressly said that the defendant was not, in that indictment, charged with any official misconduct. Again, the public, to be defrauded, must be the public in whose court the indictment is pending.

The second objection is, that the offence was not consummated in this county.

All the facts which constitute the offence must have been committed within the jurisdiction of the court before which the trial is to be had. Such is the rule of the common law. Here the indictments charge that J. K. Paulding was a navy agent at the city of New York; that the intent was to get the money of the United States out of the hands of that navy agent in New York. The crime consists of two distinct facts—the intent, and the obtaining the money; the means are not of themselves unlawful unless accompanied by the intent, and an actual injury. But time and place are material, and must be alleged. If the offence be commenced in one county and consummated in another, the

venue cannot at common law be laid in either county, and the offender cannot be convicted. Archbold, 11; 1 Chitty, Cr. L. 177, 178; 2 Cur. Hawk. 255, 325.

The third objection is, that the pretences are not well set forth.

In this respect, Mr. Coxe contended that these indictments were liable to the same objections which the Court decided to be fatal to the former indictments upon the same transactions; and as to the transaction of \$2,000 with Mr. Hambleton, it appeared, upon the face of the indictment, that more than two years had expired before the indictment was found. Starkie, 58, 64, 67, 71; 6 Dane's Ab. 154, § 22; *Godin v. Ferris*, 2 H. Bl. 14; Laws of United States, Vol. 2, p. 99, April 30, 1790, § 31; 1 Chitty, 151, 223.

In the first and third of these indictments the false pretence alleged is a mere naked lie, which is not an indictable offence at common law. 1 Cur. Hawk. 318, note. It is not averred that the sum of \$750, drawn from Mr. Paulding, was obtained by any false pretence. The pretence is only averred to be with intent to place the money in the hands of Paulding,—not to draw it out.

Then as to the \$300 transaction, there is no distinct offence charged—no averment of any false pretence. The intent averred is to obtain money from Paulding; not from the United States. The only averments are, that he wrote the letter and drew the draft.

Mr. Key and *Mr. Swann*, *contrà*, took nearly the same ground as in the former cases.

They contended that the charge is not for misfeasance, or non-feasance in office. His official station only furnished him the means of perpetrating the fraud. The offence would have been the same if he had not been in office. This is as much a common-law offence as if one of the high officers of the government should commit murder, or larceny, or assault and battery. The averment of his official character was only to show how the deceit was effected.

As to the objection that the money was paid in New York, and therefore the offence was not complete here, the payment of the money by Mr. Paulding to Mr. Fowler is not a necessary ingredient in the offence. The whole fraud was committed here. The pretence, the letter, the draft, the requisition, the receipt of the money by the defendant, were all done by him here. He could not be tried in New York, for he had committed no offence there. The only reason for averring that the money was paid by Paulding was to show that the fraud had been effectual.

1 Chitty, 190, 191, 192, 193; *United States v. Wright*, in this Court, April, 1822, (2 Cranch, C. C. 296.)

As to the objection to the false pretence, that it was a naked lie—a naked lie, in a fraud upon the public, is sufficient. “False pretences” are not necessary words in the indictment. Falsehood is enough. A falsehood is a false pretence. Imposition is sufficient. *Jones’s case*, Leach, 208; 2 East, P. C. 838.

As to Hambleton’s case, it does not appear on the face of the indictment, when the indictment was found, although the act is said to have been committed on the 6th of March, 1827. But the day is immaterial, and the limitation cannot be taken advantage of by demurrer. It must be pleaded; for the United States may reply that the defendant fled from justice, which they cannot do upon demurrer. This objection would not be good upon a motion in arrest of judgment. *Porter’s case*, in this Court, at December term, 1812, (2 Cranch, C. C. 60;) Archbold, 14; 7 W. 3, c. 3; Starkie, 64; 5 East, 259; 1 Chitty, 223; *Lee v. Clark*, 2 East, 333; *Lloyd v. Williams*, 3 Wilson, 258; 1 Chitty, 283, 284, 285.

The proviso in the Act of April 30, 1790, § 32, [1 Stat. at Large, 119,] is only applicable to offences created by the statutes of the United States; for the United States had no criminal common law, and there could be no common-law misdemeanors against the United States to which the limitation could apply.

Mr. Jones, in reply.

By the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] the laws of Maryland were to remain in force here as they existed in Maryland on that day, and were to be administered here exactly as, and no otherwise than, they could have been administered by the courts in Maryland; and there can be no common-law offence here which would not have been a common-law offence in Maryland. This Court is only a court of the District of Columbia, with the superadded jurisdiction of a Circuit Court of the United States. As a circuit court of the United States they cannot exercise jurisdiction of these offences, because they are not created by an act of Congress; and as a court of the District of Columbia, they can only exercise the jurisdiction which a State court could exercise.

Then, what is the nature and essence of the offences charged in these indictments? It is true that in some senses, all offences committed within this district, are offences against the United States. The United States is the territorial sovereign of this district; and every offence must be either against a statute of the United States, or would have been an offence against the State of Maryland. Every immoral act is not necessarily a

common-law offence. Common-law offences are all defined; for although it is said to be *lex non scripta*; yet its evidences are written, in the reports of the judgments of the courts, and in the elementary treatises of the sages of the law. No such offence as this, against the United States, is known to the common law of Maryland; therefore this offence could not be tried in the State courts of Maryland.

The argument, that what would be in Maryland a common-law offence against the sovereignty of Maryland, would be here a common-law offence against the sovereignty of this District, has grown out of the same confusion of ideas. There can be no common-law offence here, but against the United States as the local sovereign; but if it be an offence against the United States, as the national sovereign, it cannot be a common-law offence. If the offence affect the Treasury of the United States, if it affect the whole nation, it is an offence against the United States, as sovereign of the Union, and cannot be punished unless the offence has been defined, and its punishment prescribed by statute. The officers of the general government have no local habitation, and cannot be punished for an act done here, for which they could not be punished in any of the States. These offences depend essentially on the performance, or non-performance of the official functions of a public officer, which affect the Union at large. Our objection turns exclusively upon the quality of the act, not upon the official character merely of the defendant. The means and the turpitude of this offence, grew out of his connection with the United States as a public officer. Before the argument from the analogy of sovereign can apply, the offence must be an offence against the local sovereign of the district. The United States as the local sovereign of this District, is as distinct from the United States as the sovereign of the Union, as two independent sovereignties.

These principles are applicable to the present case. They are not opposed to the opinion heretofore given by this Court, because the Court then decided that those indictments did not charge official misconduct. If these indictments do not charge official misconduct, they charge no offence.

As to the \$750 case, two distinct charges are made in the same count, and it is therefore bad.

It charges, 1st. That the defendant wrote a letter of advice, and drew a draft, and received the money from Mr. Fowler, and applied it to his own use. 2dly. That he obtained the requisition, &c. The intent only is averred to be the offence, the intent to acquire for his own use the money of the United States; that he pretended, &c., and procured the money to be placed in

the hands of the Navy Agent ; but no deceitful practice is averred by which the defendant got the money out of the hands of the navy agent. How could his official character be the means of effecting the fraud, without misconduct in office? It must be a breach of his official trust. If he assumes to do an act which he has no authority to do, his office is not the means of effecting the fraud. The defendant had no authority to do what he did, and therefore the Secretary of the Navy, and the Navy Agent, could not be deceived by any pretence of such authority. They both knew the extent of his authority. His official character, therefore, could induce no confidence *quoad hoc*, namely, the necessity of placing this money in the hands of the Navy Agent. The Secretary of the Navy had no right to trust the assertion of the defendant. He could not be deceived, unless the defendant had a public *primâ facie* authority to do what he did. It is not averred that he wrote the letter as 4th Auditor; but *being* 4th Auditor. The averments of his official character and duties, therefore, are not made for the purpose of showing the means by which the deceit was practised.

As to the \$300 case: It is not pretended that the defendant had authority to write the letter, and therefore it could not appear to be an official letter. If he had authority, then it was an official misdemeanor.

In the 1st and 3d of these indictments, a misrepresentation is averred, but that misrepresentation could not deceive the Secretary of the Navy, because he had no right to look to the defendant for information upon matters of which the Secretary was, or ought to have been better informed than the defendant. The pretence was too shallow to deceive. If there was no pretence, nor deceitful practice, there was no indictable fraud. Stripped of its official character, it is worse than the former one upon the same fact. Deceitful practices must be set out; the means must be effectual, and the fraud must be effected by those means.

Then as to the averments of place and time. 1. As to place. If the fraud be not carried into effect, it is not indictable. It is not a public offence unless consummated. The place must be stated, to show that the Court has jurisdiction. All the acts necessary to complete the offence must be done within this county. The law of England is very strict on this point. The payment of the money in New York was necessary to complete the offence; for if Mr. Paulding had not paid the draft, the United States would not have been defrauded. 2 Hale, c. 3, 4, and 5; 1 Chitty, 190, 191, 192. But it is said that in misdemeanors, the ingredients may be subdivided; and that where one of the acts constituting the offence was done in one county, the trial may be

there; but it must be the final act, that which consummates the offence. The instance put is misprision of a felony committed partly in one county, and partly in another; but the misprision, which is a separate and independent offence, was committed in one county only, namely, the county in which the knowledge of the felony came to the accused. If the last act done by the present defendant was that which was done here, then he is innocent, for the offence was not complete when his last act here was done. The last act was done by this defendant in New York, by receiving, through and by his agent, Mr. Fowler, the money of the United States from Mr. Paulding, when he paid the draft. There is no election of jurisdiction. The place where the offence is consummated, fixes the jurisdiction. So if a man here, by letter procure a murder to be committed in New York by an innocent agent, he is guilty of the murder in New York, and may be tried there. 1 Hale, 190, 191, 374, 618, 652, 653, 708; *Rex v. Munton*, 1 Esp. Rep. 62; 1 Chitty, 191, 192; *Wright's case*, in this Court in April, 1822; (2 Cranch, C. C. 296.)

2. As to the time. If it regard a material averment, it must be consistently stated, and an indictable offence must be shown upon the face of the indictment; if not, it is bad upon demurrer. But it is said that it must be pleaded, so as to give the prosecutor an opportunity of replying the flight of the defendant. If the defect does not appear on the face of the indictment, the defendant may avail himself of it upon the general issue. *Larner's case*, in this Court, (not reported,) and *Porter's case*, in this Court, (2 Cranch, C. C. 60;) *Adams v. Wood*, 2 Cranch, 336. The indictment must show the time to be within two years before the finding of the indictment; but it need not be averred, that the time was within the limitation. And this explains the case of *Lee v. Clarke*, 2 East, 333, where it was only decided that the averment that the act was done within six months, was unnecessary. *The King v. Stevens and Agnew*, 5 East, 259.

It is said that the United States cannot, upon demurrer, show the flight of the defendant. But the United States ought to have stated it in the indictment, if the indictment itself showed that the time limited for the prosecution had expired. Or they might have stated the offence to have been committed on some day within the limitation.

It has been supposed that the proviso in the Act of April 30, 1790, limiting the prosecution to two years, does not apply to common-law cases. But this Court has decided that point in the cases before mentioned, of *Larner* and *Porter*, and the law has been ever since considered as settled, and the benefit of the limitation has been allowed in many cases of common-law offences. See also Stephen on Pleading, 312.

CRANCH, C. J., delivered the opinion of the majority of the Court, as follows: Three new indictments have been found by the grand jury, to which the defendant has demurred. The first ground of demurrer is common to the three indictments, and if available at all, is a bar to any prosecution whatever for the matters therein charged. It supposes the charge in each case to be merely for official misconduct of the defendant as 4th Auditor in the Treasury Department of the United States, in which case it is contended by the counsel of the defendant, that it is an offence, exclusively against the United States in their national character, in which character they have no common law; and, therefore, there can be no offence against the United States, (in that character,) which has not been defined, and its punishment prescribed by statute. And that, as there is no statute applicable to the matters charged in these indictments, those matters are not indictable or cognizable by any court of the United States as such. That as the creation of offices and officers, and their duties, are matters of exclusive federal legislation, and as the judicial power of the United States is coextensive with its legislative power, no State court can take cognizance of the malversations in office of any federal officer. That this Court cannot, by virtue of any transfer of jurisdiction by Maryland to the United States, exercise any jurisdiction, which a State court in Maryland could not have exercised on the 27th of February, 1801, or on the first Monday of December, 1800, when this District became, by law, the seat of the Government of the United States; and as no court in Maryland could, at that time, have had cognizance of the matters charged in these indictments, it follows that this Court has no cognizance of them by virtue of any authority derived, by the United States, from Maryland, by virtue of the cession of this part of the District of Columbia.

This doctrine may or may not be correct; but, if correct, it does not apply to the present cases, if the charges in these indictments be not for official misconduct of the defendant, as an officer of the national government.

In considering the demurrer to the former indictments against this defendant, the Court was satisfied that the charges, in those cases, were not for official misconduct, but for frauds at common law; and, in that respect, we see no material difference between those indictments and these.

It is true that the first of these indictments avers that the defendant was Fourth Auditor, &c., at the time when he did the act complained of, and sets forth so much of his duty as such Fourth Auditor, and so much of the duty of the Navy Agent as was supposed necessary or proper to show how the

defendant's letter and draft, of the 16th of January, 1828, might deceive or impose upon the Navy Agent, so as to induce him to pay the draft; and how his pretence, that the sum of \$750 was required for the use and service of the navy of the United States, for payment of arrearages, might deceive or impose upon the Secretary of the Navy, to induce him to increase the requisition in favor of Mr. Paulding, and to show why these officers should have given their confidence to the defendant. But this averment of his official character and duties is not an averment that the acts, with which he is charged, were committed in, or by virtue of, his office, or constituted any violation or neglect of his official duties.

It has been justly observed, that to charge that the defendant, being Fourth Auditor, &c., committed larceny, or robbery, or murder, is not to charge him with official malversation.

The Court is, therefore, of opinion that these indictments (for that which we have just considered appears to be the strongest case in favor of the defendant, upon this point,) do not charge the defendant with official misconduct only, but that they stand, in this respect, upon the same ground as those upon which the former opinion of this Court was given; which opinion, we think, is not shaken by the argument in the present cases, but is as applicable to these as it was to those.

But it is said, that if these indictments are not for official misconduct, yet each of them is insufficient, for want of precise and explicit averments of the deceitful practices by which the frauds are supposed to have been effected, and that the frauds were effected by means of such deceitful practices.

With a view to this question, it will be necessary to examine them separately.

The first is for the \$750 obtained from Mr. Paulding.

After setting out the official character of the defendant, as Fourth Auditor, and his duties, the authority of the Secretary of the Navy to issue requisitions to the Secretary of the Treasury, and of the latter to grant warrants on the Treasury of the United States, according to such requisitions, the official character of Mr. Paulding, and a part of his duties, as Navy Agent; and that an appropriation of \$20,000 had been made by law, on the 2d of March, 1827, for the use of the Navy Department, for arrearages prior to the 1st of January, 1827, the indictment charges that the defendant, being Fourth Auditor, &c., and intending fraudulently and unjustly to obtain and acquire for himself, and for his own private use, the money of the United States, with force and arms, on the 16th of January, 1828, at Washington county, in the District of Columbia, falsely and

fraudulently wrote, addressed, and caused to be sent to Mr. Paulding, Navy Agent in New York, a letter of that date, in the words and figures following —

“ Treasury Department, Fourth Auditor’s Office, January 16, 1828. Sir, — I have this day drawn on you for seven hundred and fifty dollars, in favor of C. S. Fowler, on one day’s sight, to meet which a remittance will be made to you by the Treasurer of the United States, so soon as the requisition can pass through the forms of office, under the head of ‘ Arrearages prior to 1827,’ of the like sum, and to this head you will be pleased to charge the draft, when paid. The draft is made at one day’s sight, that time may be allowed for the remittance to reach you in due season; but should any thing occur to prevent this, you will be pleased to pay it out of any fund in your hand, and make the necessary transfer on the receipt of the Treasurer’s draft. I am, respectfully, your obedient servant, T. Watkins. J. K. Paulding, Navy Agent.”

And, on the same day, at, &c., made his draft on Mr. Paulding, Navy Agent, as aforesaid, according to the advice of the said letter, in favor of C. S. Fowler, for the said sum of \$750, and then and there sold and delivered it to the said Fowler, and received of him therefor the said sum of \$750, and kept and disposed of the same for his own use; which draft was afterwards paid by the said Navy Agent, out of the moneys of the United States in his hands.

The indictment further charges, in the same count, that the said J. K. Paulding, Navy Agent, as aforesaid, on the 16th of January, 1828, wrote, addressed, and sent to the Secretary of the Navy a letter, requesting him to issue a requisition, in his favor, for the sum of \$12,139.12, under certain specified heads of appropriation, the head of “ Arrearages” not being one of them; which letter was received by the Secretary of the Navy, at Washington, on the 19th of January, 1828. That the defendant then and there, being Fourth Auditor, &c., and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, &c., on the said 19th of January, 1828, at, &c., did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the Secretary of the Navy to add to the sum for which Mr. Paulding had requested a warrant to be issued, as aforesaid, the sum of \$750, and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States, as aforesaid, that the said sum of \$750 was required for the use and service of the navy of the United States, for the payment of claims adjusted and settled under the

appropriation for arrearages due by the Navy Department of the United States, prior to the 1st of January, 1827; and did then and there unlawfully, fraudulently, deceitfully, and designedly cause and procure to be issued by the said Samuel L. Southard, then being Secretary of the Navy of the United States, as aforesaid, a requisition to the Treasurer of the United States, for the said additional sum of \$750; and did cause and procure the said sum of \$750 to be added to the said requisition of \$12,139.12, which the said J. K. Paulding had requested to be issued, as aforesaid, thereby causing the said sum of \$12,889.12 to be included in the said requisition, instead of the sum of \$12,139.12, so required, &c., by the said J. K. Paulding, as aforesaid, (which requisition is set out in words and figures,) which said sum of \$12,889.12, mentioned in the said requisition, was, in conformity thereto, by warrant under the hand of the Secretary of the Treasury of the United States, drawn out of the Treasury thereof, and placed in the hands of the said J. K. Paulding, Navy Agent, as aforesaid, the said sum of \$12,889.12, then and there being the property of the United States, with intent to defraud the said United States out of the said sum of \$750. Whereas, in truth and in fact, he, the said T. Watkins, at the time of making the said false pretences, well knew that the said sum of \$750, in the said requisition included, was not required for the use and service of the United States; and whereas, in truth and in fact, the said T. Watkins, at the time, &c., did not intend that the said sum of \$750 should be applied to the use and service of the navy of the United States, but then and there intended to defraud the United States of the same, and to convert the said sum of \$750 to his own use and benefit, and did thereby defraud the United States of the said sum of \$750, to the great damage of the United States, &c.

The first objection to this indictment is, that it charges two distinct offences in the same count: first, that the defendant, with force and arms, intending to acquire the public money for his own use, wrote the letter of the 16th of January, 1828, and drew, and sold, and received the money for, the draft of \$750 on the Navy Agent, who afterwards paid it out of the moneys of the United States in his hands; secondly, that the defendant, with force and arms, intending, as aforesaid, and knowing that the Navy Agent had asked for a requisition for \$12,139 only, on the 19th of January, 1828, applied to the Secretary of the Navy to add \$750 to the requisition; and falsely pretended that it was for the public use and service, and caused a requisition to be issued, including the \$750, which sum was, in conformity

thereto, by warrant drawn from the Treasury of the United States, and placed in the hands of the Navy Agent, and did thereby defraud the United States of the said sum of \$750.

This objection, we think, cannot be sustained. It seems to the Court that this count charges only one offence, the defrauding of the United States of the \$750, by the means set out in the whole count. The first part of the count charges only some of the means used to accomplish the fraud; the second part states the residue, and its actual accomplishment, which is averred to have been done thereby; which word, the counsel for the defendant have justly said, refers to the whole preceding matter contained in the count.

The next objection is, that it does not appear in the count by what deceitful practices the defendant got, or could have got the money of the United States out of the hands of the Navy Agent; for until the money was got out of his hands, the offence, it is said, was not complete. The false pretence to the Secretary, it is supposed, only shows the deceit by which the money was drawn from the Treasury, and placed in the hands of the Navy Agent; but that was no fraud on the United States, for it was safe in his hands.

But the answer to that objection is, that the getting the money out of the Treasury was a necessary link in the chain of means to accomplish the fraud; and if that single link was obtained by the deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offence, as if every other link in the chain had been forged by the like deception.

Another objection has been taken to this indictment. It is said that, in order to show an indictable fraud in this case, it must not only appear that the defendant drew the draft on Mr. Paulding and received the money, and that the draft was paid by Mr. Paulding out of the public moneys in his hands, but that the requisition which was obtained by false pretences, and by means of which the money was drawn out of the Treasury, and placed in the hands of Mr. Paulding, should, by a proper averment, be connected with the transaction between the defendant and Mr. Paulding, in regard to the draft, which, it is supposed, is not done in this indictment; and that, as there does not appear, on the face of the indictment, any connection between the \$750 drawn for and received by the defendant, and the \$750 transferred from the Treasury to the Navy Agent, it must be intended that there are two distinct sums of \$750 mentioned in the indictment; and that, therefore, when it is said, in the conclusion of the indictment, that the defendant "did thereby defraud the United States of the said sum of \$750," it is uncer-

tain which of the two sums of \$750 is meant; and that, therefore, the indictment is bad for uncertainty, and for not connecting the defendant's receipt of the money with the false pretences.

It has already been said, by this Court, that the getting the money out of the Treasury was a necessary link in the chain of means to accomplish the fraud; and that if that were done by the deceptive practices of the defendant, those deceptive practices are as effectual in constituting the offence, as if every other link of the chain had been made by the like deception.

But it is now urged that the links of that chain are not connected; that the chain consists of two parts, which have never been joined; and that the false pretence is applicable to one of those parts.

The chain of facts is this:

1. The letter from the defendant to the Navy Agent at New York, in which he informs him that he has drawn on him, in favor of C. S. Fowler, for \$750, at one day's sight, to meet which, a remittance of a like sum will be made to the said Navy Agent, by the Treasurer of the United States, as soon as the requisition can pass through the forms of office, under the head of "Arrearages prior to 1827," and that to this head he should charge the draft, when paid; and that, if the remittance should not reach him in due season, he should pay it out of any fund in his hands, and make the necessary transfer on the receipt of the Treasurer's draft.

2. The draft, drawn on the same day, according to the advice of the letter.

3. The sale of the draft to Mr. Fowler.

4. The receipt of the money, by the defendant, from Mr. Fowler.

5. The payment of the draft by the Navy Agent out of the moneys of the United States in his hands.

6. The requisition and the Treasurer's draft, in conformity with the assurance contained in the letter.

7. The false pretences by which the requisition and the Treasurer's draft were obtained; and by which the 750 dollars were drawn from the Treasury and placed in the hands of the Navy Agent.

8. The averment that the defendant did thereby defraud the United States of the said sum of 750 dollars.

We see no want of connection in this chain. The Treasurer's draft, which transferred the 750 dollars from the Treasury to the hands of Mr. Paulding, is as much connected with the original letter of the 16th of January, as the draft of the defendant is

connected with it. They are both mentioned in that letter; and Mr. Paulding had as good a right to expect the one as the other. It is true, there are other facts mentioned in the indictment, but they are only such as were necessary to show the false pretences by which the defendant obtained that Treasury draft; and do not break the connection of the material circumstances by means of which the fraud is supposed to have been effected. If the allegation respecting the Treasury warrant had immediately followed the averment of the payment of the draft by Mr. Paulding, and it had been introduced by such words as these: "And the jurors aforesaid, upon their oaths aforesaid, further present that the said Tobias Watkins, in conformity with the assurance contained in the said letter of the 16th of January, 1828, afterwards, to wit, on the 19th of January, 1828, at the county of Washington aforesaid, did cause the like sum of 750 dollars to be drawn from the Treasury of the United States, and placed in the hands of the said J. K. Paulding, Navy Agent as aforesaid, by means of a warrant issued by the Secretary of the Treasury of the United States," &c., and if it had been followed by the proper averment of the deceitful practices used by the defendant to obtain the warrant, we think this objection would not have been taken; yet the words "in conformity with the assurance contained in the said letter of the 16th of January, 1828," would have been only an averment of an inference of law from the facts stated. For, whether the remittance was in conformity with the assurance contained in the letter, was a mere question of law; it would, therefore, have been an immaterial averment, and would have amounted to nothing more than the law would infer from a comparison of the terms of the letter with the averment respecting the warrant. We think, therefore, that the connection between the defendant's letter of the 16th of January, 1828, and his draft, and the Treasurer's remittance, is sufficiently apparent upon the face of the indictment; and that it does sufficiently appear that the 750 dollars, of which the defendant is charged with defrauding the United States, are the 750 dollars included in the requisition and warrant, which the defendant, by anticipation, perhaps, drew out of the hands of the Navy Agent, through the medium of Mr. Fowler, the broker.

We have said, "by anticipation, perhaps;" for it does not appear, upon the indictment, whether the Treasurer's remittance reached Mr. Paulding before or after he had paid the draft. Nor is that question material; for if he paid it before he received the remittance, he paid it upon the assurance of a remittance which was afterwards actually made. In either case, therefore, he paid it out of the moneys of the United States in his hands.

It seems to us, therefore, that the chain of facts and circumstances which are set forth in the indictment, as the means of effecting the supposed fraud, are sufficiently connected ; and that the deceitful practices averred to have been used, by the defendant, in obtaining one of those means, (namely, the requisition,) infect with fraud the whole transaction, as it appears upon the face of the indictment.

Another objection taken to this indictment is, that the offence was not complete until the money was paid by the Navy Agent in New York, and that unless all the acts which constitute the fraud were committed in this county, this Court has not jurisdiction of the cause.

It was suggested, however, that, even if that doctrine be correct, it will apply only to the acts of the defendant himself, and not to the act of the Navy Agent in New York who paid the money.

But to this it was answered that Mr. Fowler, in whose favor the bill was drawn, and who received the money from the Navy Agent in New York, was the innocent agent of the defendant, and acted under his authority in receiving the money there.

Admitting this to be so, yet Mr. Fowler, with some reason, may be considered as the innocent agent of Mr. Paulding in paying the money here, in Washington ; for his act was ratified by Mr. Paulding, when he accepted and paid the bill in New York ; and a ratification is equivalent to an original authority, according to the maxim which the common law lawyers have drawn from the civil law, *omnis rati habitio retrotrahitur, ac mandato æquiparatur*. D. 50, 17, 152, 2.¹

The discount of a bill is only the anticipation of the fund upon which the bill is drawn. The money is advanced on the credit of the bill, and in the expectation that it will be accepted and paid. If it be accepted and paid, the broker who discounted it is reimbursed. His act, in advancing the money, has been ratified ; and the drawer of the bill, for whose accommodation it was discounted, has got by anticipation the very fund upon which he drew. The ratification by the drawee, of the act of the broker, relates to the time of that act, and constitutes the money advanced, the money of the drawee, at the very time of advancing it. In the present case, the defendant did not receive the money of the United States in New York ; he received it at Washington from Mr. Fowler, who advanced it on the credit of

¹ The Digest, 50, 17, 152, 2, extends the principle to criminal cases — “*in maleficio rati habitio mandato comparatur*.”

the bill; and when the Navy Agent in New York paid the bill, he adopted and ratified Mr. Fowler's act in advancing the money, and this ratification related to the time of the discount.

It is only by a fiction of law that it can be pretended that the defendant received the money of the United States in New York, and it is not a greater fiction to suppose that Mr. Paulding, by the instrumentality of Mr. Fowler, paid the money in Washington, than that the defendant, through the same instrumentality, received it of Mr. Paulding in New York. If the defendant received Mr. Fowler's money in Washington, and afterwards received the money of the United States in New York, then he must have received the money twice, which is not pretended. Then, if he received 750 dollars only once, and if he received 750 dollars of the money of the United States, the 750 dollars which he received was the money of the United States. If the only money he received was received by him in Washington, and if he received 750 dollars of the money of the United States, then the money of the United States which he received was received by him in Washington. The argument is, at least, as strong in favor of his having received the money of the United States at Washington, as it is of his having received it at New York.

But there is another view of this subject which has been taken by the counsel for the United States, and which it may be proper for the Court to notice.

It is contended by them that the offence (meaning the offence charged in this indictment, which is a fraud upon the United States,) was complete when the defendant sold the draft and received the money from Mr. Fowler, and before the draft had been paid by Mr. Paulding out of the moneys of the United States in his hands; and that the defendant might have been immediately prosecuted and convicted for this offence, even if Mr. Paulding had refused to honor the draft, because the United States might have been prejudiced thereby if the draft had been paid, and that the risk which was thereby occasioned to the United States by the drawing of the bill was an actual prejudice to the United States, although that prejudice is not stated in the indictment as the injury done to the United States by the fraud; and although the injury alleged in the indictment is the defrauding of the United States, by the defendant's getting and applying to his own use 750 dollars of the money of the United States.

It is said that the fraud was complete, upon somebody, when the defendant received the money from Mr. Fowler; that it is immaterial whether it was then a fraud upon the United States or upon Mr. Fowler; that it certainly was a fraud upon one

or the other; and that the defendant is equally guilty whether one or the other was, or whether both were injured thereby. That the question who was injured thereby, or how injured, does not affect the question of guilt. That they are immaterial circumstances, and need not be set forth with averment of time and place.

But a majority of the Court is of opinion that this indictment, which is for obtaining by false pretences, or deceitful practices, 750 dollars of the money of the United States, could not have been maintained if Mr. Paulding had not paid the draft; and that until the draft was paid, the offence charged in this indictment was not complete.

Upon the whole, it is the unanimous opinion of the Court, that none of the objections taken to this indictment can be supported.

As to the second of these indictments, the Court wishes further time for consideration.

As to the third of these indictments, (that upon the transaction with Mr. Hambleton,) the principal objection is, that it appears, upon its face, that the offence, if any, was committed more than two years before the finding of the indictment, — the time limited by the thirty-second section of the Act of the 30th of April, 1790, — by which it is enacted, "That no person or persons shall be prosecuted, tried, or punished, for treason, or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury, within three years next after the treason, or capital offence aforesaid, shall be done or committed; nor shall any person be prosecuted, tried, or punished, for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid. Provided that nothing herein contained shall extend to any person or persons fleeing from justice."

In answer to this objection it has been said, —

1st. That it does not appear, upon the face of the indictment, at what time it was found.

2d. That advantage of the limitation cannot be taken upon demurrer, because the United States would thereby be precluded from replying, according to the proviso of the act, that the defendant fled from justice within the two years. And,

3d. That the limitation extends only to such offences and penalties, &c., as are created by acts of Congress, and not to common-law offences, because there could be none such against the United States, in its national character.

1. The answer to the first objection is, that it will appear, from the caption of the indictment, whenever the record is made up, at what time the indictment was found; and, upon demurrer, the judgment of the Court must be upon the whole record. And if, upon the whole record, it should appear to the court that the offence was committed beyond the time limited, they could not give judgment against the defendant.

Thus, in *The King v. Fearnley*, 1 T. R. 320, "the court said they were of opinion that this was a good objection; because, by the caption of the indictment, it appeared that the Quarter Sessions had no jurisdiction. Upon a demurrer to an indictment, the court must look to the whole record, to see whether they are warranted in giving judgment on it." So in the cases of *Rex v. Fisher*, and *Rex v. Saunders*, 2 Strange, 865. "In the case of *Fisher*, judgment was arrested after verdict; and, in the case of *Saunders*, one indictment was quashed, being taken at an adjourned Sessions, and it not appearing what day the original Sessions began, to bring it within the time prescribed by the statute."

2. To the second objection, that the defendant cannot take advantage of the limitation upon demurrer, the answer is this, that however it may be in practice, yet in theory, and by law, if judgment, upon demurrer to an indictment for a misdemeanor, be given against the defendant, it is a peremptory judgment of condemnation; and although, in practice, the court will often rather intimate its opinion than pronounce sentence, and will permit the defendant to withdraw his demurrer and plead to issue, yet upon the question, whether the defendant may avail himself, by demurrer, of a bar apparent upon the record, the court must consider what would be the legal consequence of a judgment upon the demurrer; and when we see that it may be a peremptory judgment, and that the defendant has a good defence upon the face of the record, the court cannot deprive him of the benefit of it. *Pugh v. Robinson*, 1 T. R. 116.

We think, therefore, that the defendant has a right, upon demurrer, to avail himself of the limitation of the statute.

It has been said, that the United States would thereby be precluded from replying the flight of the defendant, if such should have been the fact. But that is not the fault of the defendant; the United States have put themselves in that situation, by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so, for they might have laid the day to be within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have

shown that the defendant fled within the two years after committing the offence, they might have given it in evidence; or they might have stated in the indictment the true time, and any facts which existed, and went to show that the defendant could not avail himself of the limitation.

3. As to the third objection, that the statute does not apply to common-law offences, committed within this district, the answer is, that this Court, so long ago as December term, 1812, in the case of *The United States v. Porter*, (2 Cranch, C. C. 60,) who was indicted for certain frauds at common law, decided that the limitation of the Act of 1790 did apply to such cases. It is true that, in that case, it appears by the docket-entries that the defendant pleaded "not guilty, and the act of limitations;" but Mr. Key, who was counsel for the defendant in that cause, having, upon the trial, objected to evidence of transactions which took place more than two years before the finding of the indictments, said — "We do not rely upon the special plea of the statute of limitations, but make the motion on the plea of 'not guilty.'" Mr. Jones, who was then Attorney for the United States, contended, as it is now contended by the counsel for the United States, "that the Act of Congress does not apply to this case. It was passed in 1790, and refers only to the cases within the jurisdiction of the circuit courts of the United States, and only to crimes punishable in those courts. It does not apply to jurisdictions created subsequent to that act. What crimes and offences were then in the contemplation of the legislature? Nothing but offences created by act of Congress. The circuit courts of the United States had no common-law jurisdiction. They had no cognizance of common-law offences." Mr. Key, *contra*, observed — "The law ought to be construed liberally, for the benefit of the accused. This case is in the very words of the statute."

This Court, in that case, was clearly of opinion that the Act of Congress of the 30th of April, 1790, § 32, [1 Stat. at Large, 119,] applied to the case, and directed the jury that they could not find the defendant guilty upon that evidence.

This decision of the Court has been acquiesced in by the public; and the question, we believe, has never been made since.

We are, therefore, of opinion that the judgment upon the demurrer to this indictment must be for the defendant.

THRUSTON, J. On demurrers to two indictments, known to the Bench and Bar as indictments Nos. 1 and 2, — No. 1 charging the defrauding the United States of \$750, and No. 2 of \$300,

I remarked, on Saturday last, in the course of the argument

on a point which the Court, at the earnest instance of the defendant's counsel, permitted them to be heard upon, because the reasons assigned by the Court, in their opinion, (which was against the demurrer No. 1,) on the much agitated question of jurisdiction, were such as had not been before considered and discussed, that I had not an opportunity of full examination of the indictments, but that I had met the other two judges, and advised with them; and that, as to the one for \$750, I had concurred with the Court in its sufficiency, and that the demurrer ought to be overruled; but that I had, on Thursday evening, taken home with me the two indictments aforesaid, and attentively examined them, and that I was more confirmed in my belief that the Court were right in their opinion, delivered in the one for \$750, or No. 1, although, perhaps, my reasons for this belief were not entirely the same as those assigned in the opinion of the Court. I also remarked that I was prepared, when the Court gave their opinion on the said indictment, No. 1, but took time for further consideration on No. 2, to give my opinion as to the sufficiency of No. 2, which, I said, I deemed the most unexceptionable of the two; but I did not think proper, at the time the said opinion was pronounced, to mention my satisfaction with the said No. 2, from courtesy to the majority of the Court. After a few preliminary remarks, I shall state my reasons for the opinions above suggested.

An intimation was thrown out, also, on Saturday last, that I had indicated some impatience, occasioned by the protracted discussion of the cases before us. If I have done so, I was not sensible of it; and if my deportment subjected me to such suspicion, or if I unconsciously exposed myself to it, I must look for an apology in the eight or nine weeks of daily debate, of at least six hours each day, chiefly on technical points, which ought to be understood, if they can be understood at all, at least in as many days as we have consumed weeks. But we have, as I thought, with great patience listened to all that we were desired to hear; and with the more willingness, as the importance of the case has been urged with much solemnity, although I have never been able to discern any peculiar circumstances which can distinguish this case from that of others of the same grade.

Fraud at common law is but a misdemeanor. This is a general term for that class of offences which are considered the least heinous; and I understand that the punishment, on conviction, is but one degree above that of the lowest offence. Pecuniary fine is considered, I believe, the lightest punishment

known to the law for fraud ; imprisonment may be superadded, but at the discretion of the Court.

If this case, then, be of any particular importance, we must search for it in extrinsic circumstances ; this is forbidden ground to judges ; we cannot travel out of the record, and if, in the course of judicial investigations, or from other sources, any knowledge may reach us, of facts calculated to excite, in our breasts, sympathy for the accused, we are bound by the stern mandates of duty to suppress them, while we occupy these seats.

The questions now before the Court, are on the sufficiency of the two indictments. Two points have been made. 1st. That offences, charged in the indictments, are not cognizable in this Court ; and if they are, that they are not properly charged.

The question of jurisdiction results from the statement, (as it is alleged,) in both indictments, that the fraud, if any, was completed in New York, where the money was received from the Navy Agent, Paulding ; and that, therefore, if the facts alleged, constitute a fraud, it is indictable there, and not here. The indictment, No. 1, has also been impeached on the ground that it charges two distinct offences ; the one for \$750 received, by the means of Fowler's draft from Paulding in New York, and another, for a like sum, from the Treasury, by means of the Treasurer's warrant issued here on the order of the Secretary of the Treasury, upon the requisition of the Secretary of the Navy ; which requisition included the false and spurious item of \$750 for " arrearages prior to 1827," imposed, by false pretences, on the said Secretary, to lead him to add it to Mr. Paulding's legitimate demand of \$12,139.12, thereby causing falsely, and fraudulently, the said Secretary to issue a requisition on the Treasury Department for \$12,889.12, including this imposed item, instead of the first lawful amount.

The indictment No. 2, has been stigmatized as wanting precision and proper averments.

In support of these criticisms on the indictments, a great number of authorities were cited, chiefly from compilations and digests of modern date, which, if I had the books now before me, as in truth I have not, I should not have time to examine them with sufficient deliberation, and, therefore, must make up my opinion from the impressions received at the time the authorities were cited, from general principles of law, and the exercise of such understanding as it has pleased Providence to endue me with. But these books were, principally, as I said before, compilations and digests, which, if I understand them, are attempts to frame general rules out of particular cases, and

in support of those rules, the authorities are cited in the margin; that is, reports of adjudged cases. Now, as to so much of the case before us, as relates to the form and structure of the indictments, the allegations, averments, the narrative part, if I may so call it, of a course of transactions resulting in a breach of the laws, particularly in frauds, nothing can be more fallacious than general rules. Let us consider the infinite diversity of stratagems and devices by which a fraud may be achieved. Some, like the old legitimate drama, consist of unity of time, place, and action; others, like the more modern, have a number of acts and scenes, which are shifted from place to place, and time to time, till the plot ripens and is perfected. Hence, and from the peculiar and diversified nature of the contrivances made use of to accomplish a fraud, there must be an equally diversified form and manner in the statements in an indictment. A fraud may be completed, at one time, one place, and by one act; and if A. uses a false token to B., and cheats and imposes on him, to get hold of B.'s money, this is a simple fraud, and easily charged in an indictment. But a fraud, which requires, for its accomplishment, a more extended and compound course of deceptions, partly by false representations in writing, and partly verbal, where several persons are to be deceived, before the attainment of the end, and where operations are to be carried on in several distant places; here all these various circumstances being required to be set out in an indictment, such an indictment must necessarily vary from any other indictment that was ever drawn before it; and therefore, as to its peculiar form and structure, no precedent of forms can be found to apply to it. I do not want precedents to inform me of the leading principles which must govern all indictments, that they must be certain and precise in their charges; that the *quo animo* must be averred, the *scienter*, &c.; that the negations must exclude any possible legal inference of innocence in the acts or intents of the accused, &c., and as far as such general rules and principles as these go, I will pay all due respect, and have applied them, and measured these indictments by them, and have not found them deficient. My confidence in those books, also, is much impaired by what I have seen on this trial, and what I have often seen before. I have seen book opposed to book by opposite counsel; nay, I have seen the same book used to bear on the same point by both sides, which leads me to the mention of an observation of a very learned judge on this subject, whom I had occasion to allude to once before. This distinguished Chancellor of Virginia, having been rendered exceedingly impatient at the frequent reversal of his decisions by the Court of Appeals of Virginia,

he published, as I said before, a book in vindication of his opinions, and arraigning those of the appellate court. I remember, in a certain case, the Superior Court had cited a precedent from Bulstrode, which pressed hard on the chancellor's decree. He did not know how to get rid of the force of this case, and therefore, belittled—if I may use the term, it has high authority for its legitimacy—the author by saying, “Ah! as for Bulstrode he is like a Swiss soldier, he will fight any side for pay.” May not this be said of some of our innumerable modern book-makers? I have often seen them, (to carry on the venerable chancellor's figure) battling on both sides. I do most seriously deplore and deprecate this overwhelming inundation of books, particularly of the class just mentioned. They are good labor-saving machines to the practitioner, but they have a woful effect on the administration of justice; and I really do apprehend, that they will, if not stopped, subvert to its foundations the empire of common sense, and render the law, which is said by my Lord Coke to be the most miserable slavery if it be vague or uncertain, the most unsettled and doubtful of all human sciences. Now, to apply the form of any one indictment, (which has been attempted,) from the books to the indictments before the Court, so different in the facts, intents, incidents, stratagems, and artifices, by which to test them, is like applying two vacant figures and forms, one to the other, to test their coincidence. As to those books, again; I have observed that many of the authorities cited by them do not support the rules laid down by them; whether this proceeds from misprints, or a want of understanding of the spirit of those authorities, I know not.

I will now go into the examination of the indictment, No. 1, for \$750, and try it, not by precedents of other forms of indictments for other offences, but by the principles I have mentioned above.

This indictment is said to charge two distinct offences. Let us dissect it and see if this be the case. 1st. The first paragraph alleges that on the 16th and 19th of January, 1828, and before and after that time, Tobias Watkins was Auditor of the Navy Department, and states his duties as such 4th Auditor. 2d. The second paragraph alleges that Samuel L. Southard, at the same time was Secretary of the Navy, and sets out his authority as such. 3d. The third paragraph states, that, at the same time, J. K. Paulding was Navy Agent of the United States, residing in New York, and was required by law to render his accounts to the 4th Auditor of the Treasury Department, &c. &c.

4th. The fourth paragraph states that an Act of Congress was

passed on the 2d day of March, 1827, appropriating \$20,000 for the use of the Navy Department, for arrearages prior to the 1st day of January, 1827.

So far, it is manifest, the indictment is merely historical or narrative, but necessarily connected with the charges which follow; then comes the narrative of the fraud and deception practised on Paulding to obtain, out of the public money, the \$750, commencing with the letter advising Paulding of his design to draw on him in favor of Fowler, which sum would be replaced in his hands "by a remittance to be made in due season, so soon as a requisition can pass through the forms of office," &c., therein premeditating the remittance which the indictment, in a subsequent part, charges to have been obtained by false pretences used to the Secretary of the Navy. Then follows the draft in favor of Fowler, and the procuring the \$750 from him, by means of the said draft, and the payment of the draft by Paulding. Now, although this transaction is stated in the form of a charge, and to be done with force and arms, &c., yet it is not the offence which constitutes the *gravamen* of this indictment. It might have been made, perhaps, a ground of indictment as a distinct offence *per se*, as in the \$300 indictment, but is not so contemplated in this indictment. It is here introduced, because of its connexion with the real charge, the fraud practised upon the Secretary of the Navy; for it was to supply this defect in the public funds drawn out of the hands of Paulding, that the subsequent fraud on the Secretary of the Navy became necessary; and it is that fraud and its consequences which are the real subjects of this indictment. Then comes another narrative part of the indictment, stating the letter sent by Paulding to the Secretary of the Navy, dated the 16th of January, 1828, requesting a warrant to issue in his, Paulding's favor, for \$12,139.12, to be charged to certain specified appropriations at the foot of that letter, which letter is stated to have been received by the Secretary, on the 19th of January, 1828.

The indictment, thus far consisting merely of narrative, I consider as introductory or introducing to the main charge, that of obtaining the public money by means of false pretences made to the Secretary of the Navy, and deceit and imposition practised on him. Because it professes to be, on its face, an indictment for fraudulently obtaining the public money by false pretences, and no false pretence is set out in the former part of the indictment. Now, here commences the real charge — the true *gravamen* of the indictment, which is, "that the said Tobias Watkins, being then and there 4th Auditor of the Treasury Department

of the United States as aforesaid, and being an evil-disposed person, and devising and intending fraudulently and unjustly to acquire for himself, and for his own private use, the money of the United States, and well knowing the premises, with force and arms, on the said nineteenth day of January, which was in the year of our Lord" 1828, "as aforesaid, at the county of Washington aforesaid, did falsely, fraudulently, deceitfully, knowingly, and designedly apply to the said Samuel L. Southard, then being Secretary of the Navy of the United States as aforesaid, to add to the said sum of" \$12,139.12, "for which the said J. K. Paulding had requested a warrant to be issued as aforesaid, the sum of" 750 "dollars; and did then and there pretend to the said Samuel L. Southard, Secretary of the Navy of the United States as aforesaid, that the said sum of" 750 "dollars was required for the use and service of the Navy of the United States, for the payment of claims for arrearages due by the Navy Department of the United States prior to the first day of January, which was in the year of our Lord" 1827, "and to cause the same to be placed in the hands of the said J. K. Paulding, Navy Agent as aforesaid, for the purposes aforesaid, at the same time and together with the said sum of" \$12,139.12, for which "the said J. K. Paulding had requested a warrant to be issued as aforesaid."

Then follows the requisition of the Secretary of the Navy on the Secretary of the Treasury, at the foot whereof are the specifications of Paulding, under the title of appropriations, in which are stated the particular services for which the money is wanted, namely: "Pay &c., navy afloat, \$1,942;" "shore stations, \$1,058.25;" and, after some others, comes last this \$750, the specified service of which is "arrearages prior to 1827, \$750." The indictment then avers "that the said sum of \$12,889.12, in the said requisition mentioned," (which includes this false and spurious item of \$750,) "was, in conformity with the said requisition, by warrant from the Secretary of the Treasury, drawn out of the Treasury of the United States, and placed in the hands of the said Paulding, Navy Agent as aforesaid," with intent to defraud the United States out of \$750. It then states, "whereas, in truth and in fact, the said T. Watkins, at the time of making the said false pretences, well knew," &c. &c. From hence to the conclusion follow the averments of the *scienter*, of the criminal intent, and the necessary negations; the whole of which are, to my understanding, in apt and technical form, and relate entirely to these \$750 gotten from the Treasury by means of the false pretences practised on the Secretary of the Navy, and the subsequent transactions consequent thereon, and to no other \$750 whatever.

Having now taken this indictment to pieces, and examined its parts, we will put it together again and examine it as a whole. And I will premise, that as to precision in the charges, the averment of the fraudulent intents, of the false pretences, and, in short, as to all the forms required in indictments, it seems to be unimpeachable; nor has a single passage been selected and presented to the Court wherein any defect of form has been suggested. Let it be examined, and shown where any such defect appears.

But the character of the offence charged has been questioned. It was urged that it was entirely official, as laid, and therefore not cognizable here. But the indictment deserves no such reproach; the charges are exclusively of a private, and not official aspect; there is no allegation of a breach of official duty. It is true, that in the three first clauses, the official titles, powers, and duties of T. Watkins, as 4th Auditor, Samuel L. Southard, as Secretary of the Navy, and J. K. Paulding, as Navy Agent, are stated; but this seems necessary for the purpose of explaining and illustrating the connected links in the long chain of deceptions that were practised; because it was from the facilities derived to two of these functionaries from their official stations, and the influence of his own official station, that the defendant was able to effect his fraudulent devices, but he himself exercised no official function in the course of his fraudulent doings, although he availed himself of the official powers and faculties of the other two. What he did was not an abuse of any official authority vested in him, but was entirely in his personal and private character, though he was aided in facilitating his plans by the influence of his official station. So much as to this objection.

The next was to the frame and structure of the indictment; that it charged two distinct and independent offences in the same indictment. I think I have sufficiently answered this objection in my analysis of the instrument. I will add no more on this point.

The next and last objection there is no ground for, that the fraud was not completed within the jurisdiction of this Court, but in a foreign jurisdiction, namely, New York. Now, the \$750 having been obtained from the Treasury by the Secretary's warrant, rendered the offence complete here; for if the Treasury be anywhere it is here; and where Paulding received it is of no account, nor does the indictment state where he received it. The money was also appropriated to the private use of the defendant, for it was applied to the payment of his debt to Paulding, to reimburse that sum which, by fraudulent devices, he had drawn out of his hands, and the public have sustained a loss to

that amount. This indictment, in the view I have taken of it, is not liable to the objection, that the fraud was completed in a foreign jurisdiction; and if it were, I should doubt of the validity of the objection. I think the whole of the late argument on this point, as to this indictment, was totally inapplicable to it.

I am, therefore, of opinion, that judgment on this indictment be for the United States.

Mr. Coxe, for the defendant, then prayed leave to withdraw the demurrer to the indictment in the 750 dollar case, and plead the general issue.

Mr. Key, for the United States, objected, contending that after argument, and after the opinion of the Court delivered, the Court had no discretion to suffer the demurrer to be withdrawn, and to permit the defendant to plead. 1 Chitty, Cr. Pl. 437 to 442. See also *Gibson's case*, 8 East, 110.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., dissenting.)

After the Court had given an opinion that none of the exceptions taken to this indictment, for defrauding the United States of 750 dollars, could be sustained, and before any judgment had been rendered by the Court upon the demurrer, the counsel for the defendant moved the Court for leave to withdraw the demurrer and plead the general issue. To this motion the counsel for the United States objected, and prayed that peremptory judgment of condemnation should be entered against the defendant; contending that the Court has no discretionary power to permit the defendant to withdraw his demurrer and plead the general issue, after the argument upon the demurrer, and after the delivery of the opinion of the Court.

It seems to be certain, that if the Court should now proceed to give judgment upon the demurrer, that judgment cannot be judgment of *respondeas ouster*, but must be judgment of condemnation.

The questions then are,

1st. Whether the Court has a right, in its discretion, to give the defendant leave to withdraw his demurrer, and plead the general issue, after the opinion of the Court has been expressed against the validity of the objections taken to the indictment? and,

2d. Whether the Court, if it has that right, ought, under the circumstances of this case, to exercise it?

1. Upon the first question it may be observed, that the right in civil cases is conceded, and has been often exercised. But it is said, that there is no instance in which this Court has exercised it in a criminal case. This may be true, but it may be because demurrers, in criminal cases, are very rare, inasmuch as

upon a motion to quash, or in arrest of judgment, the defendant may avail himself of all the matters which he could upon demurrer. But, because no criminal cases in this Court have called for the exercise of the right, it does not follow that the right does not exist; and no reason is perceived why it should not exist in criminal as well as in civil cases.

On the contrary, Chitty, in his Criminal Law, vol. 1, p. 437, speaking of criminal cases, says, that "by leave a demurrer may be withdrawn." And again, in p. 440, he says, "when once a demurrer is filed, the defendant cannot withdraw it without the consent of the parties on whose prosecution he is indicted; or, at least, without the permission of the court." And although he says, in p. 439, that "in cases of misdemeanor no judgment of *respondeas ouster* is of right demandable, when an issue in law is found against the defendant, for the decision operates as conviction," yet he says, "as a matter of favor, the defendant may still be permitted to plead not guilty."

That a *respondeas ouster* is not of right demandable, in the present case, is admitted; and if we now proceed to judgment, that judgment must be peremptory. And the law is admitted as laid down by Chitty, in p. 441, that, "in mere misdemeanors, if the defendant demur to the indictment, and fail in the argument, he shall not have judgment to answer over; but the decision will operate a conviction."

Here the defendant does not ask the judgment of the court, upon the demurrer, that he shall answer over; but he asks leave to withdraw the demurrer, before the actual decision of the court upon it.

The cases cited, which, at first view, seem to support the counsel of the United States in opposing the motion, on the ground of the want of such a discretionary power to suffer the demurrer to be withdrawn, only show that the judgment, when given upon the demurrer, must be a peremptory judgment. In civil cases, such a motion has been often made and granted, in this Court; and we think we have as much right, in our discretion, to grant it in a criminal case as in a civil. Indeed, we think the reasons for it are much stronger in the former than in the latter, in proportion as a man's reputation and liberty are dearer to him than his lands or goods.

2. The second question is, whether the Court, in the exercise of its discretion, ought to grant the leave which has been asked?

That a man has mistaken the law, and, therefore, mistaken his defence, does not seem, of itself, to afford a reason why a peremptory judgment of condemnation should be entered

up against him ; and if he had a probable ground to suppose that he was not bound to answer criminally for the act charged, but is mistaken, it seems hard that he should not be permitted to deny the fact. For although, technically speaking, he must be considered as having admitted the facts, before he could call upon the Court for their opinion, whether those facts constituted a crime, yet it must be seen that such admission is only made for the purpose of raising the question of law.

That the questions of law, which have arisen in this case, were important, and in some degree doubtful, and that some of them were new, at least in this Court, must be apparent from the time consumed in argument by the very able counsel, and by the time which the Court deemed necessary for deliberation. This, therefore, cannot be called a frivolous demurrer.

It may be observed, also, that, although the judgment of the Court upon the demurrer, if against the defendant, is peremptory, it is not so if against the United States ; for they may send up new bills of indictment successively, until they shall have made their case perfect in form.

Another circumstance is, that in this case there is no appellate court to reverse our judgment, and correct it if it should be erroneous.

It also deserves consideration, that, from the known practice of this Court to suffer demurrers, in civil cases, to be withdrawn after argument, and after an expression of the opinion of the Court, and from the circumstances that there has been no criminal case, in this Court, in which such leave has been denied, and that the reasons in favor of it, in criminal cases, were apparently as strong, at least, as in civil cases ; the defendant, or his counsel, may have been led to believe that the same indulgence would be extended to criminal cases ; and this belief may have been kept up during the argument of these causes, by the circumstance that the witnesses for the United States, who were to support the indictment before the petit jury, have been detained here during the whole of the arguments upon the demurrers. Whereas, if the United States had discharged those witnesses as soon as the defendant had demurred to the indictment, so that the defendant might have understood that the United States expected a peremptory judgment, the defendant might have offered to abandon his demurrer before the opinion of the Court was declared, and even before the argument of counsel.

It is true that the defendant might have availed himself of the same objections to the indictment upon a motion in arrest of judgment, as by demurrer ; but it is not perceived how the

United States would have been in any degree benefited by such a course. On the contrary, if the judgment upon the demurrer to any one of the indictments should be against the United States, it would save the expense of a jury trial upon that indictment, and the United States might send up a better.

The Court is, therefore, of opinion that the leave asked by the defendant's counsel ought to be granted; provided the defendant shall waive his right of moving in arrest of judgment for any matters apparent upon the indictment.

THRUSTON, J., dissented, and gave his opinion orally, to the following effect, as reported by a stenographer.

"That he felt himself compelled to differ from a majority of the Court, in the opinion just rendered by them. That he should be well satisfied that the merits of the case should be heard, which would give the accused a fair opportunity of proving his innocence to the world, and which, by the judgment of the Court, he will have; but he could not see that he had any discretion which he could exercise on this occasion. And although the majority of the Court, among the reasons they assigned for granting leave to withdraw the demurrer, said that they did not see why this cannot be done in a criminal, as well as a civil case, he thought there was a very strong reason for it, and that was that the law forbade. And although he was not, perhaps, among those judges who entertain a very profound respect for all the *dicta* to be found in compilations and digests, yet, when they are supported by solemn decisions of courts of great dignity and authority, he felt himself bound by them. That no case could be found in which, after a demurrer was fully argued, and the opinion of the court delivered thereon, that the demurrer could be withdrawn, and the demurrant permitted to plead over." The judge then read certain passages from Chitty's Criminal Law, in support of his position. The first was 1 Chitty, Crim. Law, 440, "When once a demurrer is filed, the defendant cannot withdraw it without the consent of the parties on whose prosecution he is indicted, or at least without the leave of the court." That, although this passage might seem to favor an application, in certain cases, for leave to withdraw, yet it is far from sustaining the motion in the present case. That it was very true, perhaps, that, after demurrer filed, even in a case of misdemeanor, the court, before argument, would allow the accused a *locus pœnitentiæ*; and not tie him down to a step which he may have taken without due deliberation. That if the Court have a discretionary power, it is in this stage of the proceeding, and not after full deliberation, and after the defendant had fought every inch of ground in support of his

demurrer, and found himself defeated, after one of the most obstinate and pertinacious conflicts that was, perhaps, ever witnessed in a court of justice. That he could see no substantial difference between the opinion of the Court, solemnly delivered after argument, and the judgment of the Court. That the judgment ought to be entered after the opinion delivered, in which case the defence would be concluded, and he understands that the majority of the Court so considers it; and that, before the clerk can be directed to enter the judgment of the Court on the opinion delivered, if the defendant's counsel choose to interpose a motion of this kind, it seemed to him that it should not make any difference in the principle or in the results.

The judge further observed, that even if it was clear that he had a discretion to permit the demurrer to be withdrawn, under existing circumstances he should doubt the propriety of exercising it in the present case, after the defendant had rested on his demurrer with such confidence, and supported it with such obstinacy; and persisted in refusing to ask the exercise of this power in his behalf, until he had become informed of the opinion of the Court.

The judge, then, to sustain the remarks above made, read the following authorities. 1 Chitty, Crim. Law, 442; "But in mere misdemeanors, if the defendant demur to the indictment, whether in abatement or otherwise, and fail in the argument, he shall not have judgment to answer over, but the decision will operate as a conviction."

That this authority appeared, from the references, to be supported by a solemn decision of the Court of King's Bench, in which all the judges concurred. That the language of Lord Ellenborough, and all the judges, in that case, was so positive, and therefore the authority, (in the absence of a single case against it, either in the books or in our own practice,) so imperative, that he could not resist it. This case is to be found in 8 East, 112, *The King v. Gibson*. Lord Ellenborough there says, "Only one instance has been mentioned of the same privilege," (meaning the privilege asked of this court to withdraw the demurrer and to plead over),¹ "and that is the precedent referred to in Tremaine, on account of the magnitude of the punishment for striking another in the king's palace, being no less than the loss of the offender's hands."

Grose, Justice, concludes his opinion with these words: "But it seems that in criminal cases not capital, if the defendant

¹ But see the case itself.

demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment." "All the judges of the King's Bench concurred in that opinion; and he felt himself bound by such positive authorities, and therefore was obliged to dissent from the opinion of the court, and to refuse the motion."

The defendant having thus had leave to withdraw the demurrer to the indictment for the 750 dollars, pleaded not guilty, and the case came on for trial upon the general issue.

Mr. Coxe, for the defendant, said they would challenge two of the jurors, *Mr. Mitchell* and *Mr. Gover*.

Mr. Key, for the United States, said that the time to challenge was when the jurors were called to the book to be sworn. To which the Court assented.

Mr. Key then proposed that all the jurors should be asked, as they came to the book, whether they had formed and delivered any opinion in regard to the matters charged in the indictment in this case, and cited 1 *Burr's Trial*, 371, 373, 414; *The case of Mr. Upsher*, a juror, *Trials per pais*, 136, 145; *Joice v. Alexander*, in this Court at December term, 1808, (1 Cranch, C. C. 528); and *Porter's case*, in this Court at December term, 1812, (2 Cranch, C. C. 60.)

The Court suggested, and the counsel on both sides assented, that the whole panel should be informed by the Court that if any of them had formed and expressed any opinion respecting the matters charged in this indictment, it would be proper for them to say so when called to be sworn.

The Court also said, that if either side wished that any of the jurors should be specially asked the same question, when called to the book, it might be asked. A doubt was suggested whether, after having been asked, and having answered that question in the negative, the defendant would have a right to challenge for favor, and have that challenge tried by the triors.

But the Court intimated an opinion that the defendant might so challenge, and have the challenge so tried after the juror should have so answered the general question.

Mr. Mitchell and *Mr. Gover* having been called to the book, and having been asked the general question, *Mr. Mitchell* answered fully and decidedly in the negative; *Mr. Gover* said that he had, at times, been of opinion, from what he heard, that the charges might be true; but that he had no evidence, and had not made up a definitive opinion, and believed himself to be impartial. They were then both challenged for favor by the defendant, and tried by the triors, (the two first of the ten jurors; for when the challenges were made, the jurors challenged were

set aside until all were sworn who were not challenged.) Mr. Mitchell and Mr. Gover were then examined upon their *voir dire*, in the presence of the triors; and Mr. Mitchell having answered as before, the counsel for the defendant waived his challenge, and Mr. M. was sworn. But the triors, being asked if they had agreed upon their verdict, said that Mr. Gover did not stand indifferent, and he was rejected.

Mr. Southard being under examination as a witness for the United States, *Mr. Key* proposed to ask him the following question: "From the course of business pursued in your department in relation to ordering requisitions, would you, or would you not, have written the letter now shown to you," (Mr. Southard's letter of January 19, 1828, to Mr. Paulding,) "and have ordered the requisition now shown to you to be issued, unless it had been officially represented to you, either orally or in writing, that the 750 dollars therein contained, for arrearages prior to 1827, were wanting for the service of the United States Navy for claims arising under such arrearages?"

Mr. Jones, for the defendant, objected to the question. If the information was official it did not come from the defendant, for he is not charged with official misconduct. The only official information which the defendant could have given would have been, that some account for arrearages had been settled by him officially. The belief of the witness is not evidence. The facts on which that belief is founded are proper for the consideration of the jury; from which they may or may not infer the existence of the fact which the witness believes. Mr. Southard's letter of January 19, 1828, is no more than his private memorandum to refresh his memory. It is not evidence *per se*. The case of the books of a notary-public is an exception to the general rule. That exception is founded upon particular reasons stated by the Supreme Court in its decision. The book of a notary-public is a document *sui generis*, and is admitted upon principles which cannot be extended by analogy to any other document. *Jones v. Johns*, in this Court at October term, 1823, (2 Cranch, C. C. 426.) The notary's book can prove no fact but what was stated in it.

THE COURT (THRUSTON, J., *contrà*,) refused to permit the question to be asked.

The counsel for the United States having given in evidence the defendant's letter of the 16th of January, 1828, and having proved that the letter of Mr. Southard of the 19th to Mr. Paulding was signed at the same time with the requisition, and was copied into a letter-book to which the defendant might have had access by application to the Secretary, or to the copying clerk,

moved the Court to permit that letter of the 19th of January, 1828, to be read in evidence to the jury; but the Court refused. MORSELL, J., dissented, because he thought it ought to go to the jury as part of the *res gestæ*.

The counsel for the United States then offered to ask Mr. Southard this question: "Did you direct the requisition to be issued, and write the letter" (of 19th of January, 1828,) "now shown to you, from a conviction that the 750 dollars mentioned therein were wanting for the navy service of the United States, under that appropriation, to be sent on to Mr. Paulding?"

The COURT (CRANCH, C. J., dissenting,) permitted the question to be asked. MORSELL, J., concurred, for the reason before stated, namely, that the letter ought to go to the jury as part of the *res gestæ*.

CRANCH, C. J., dissented, because he thought, and a majority of the judges had just decided, that the letter of the 19th of January could not go in evidence to the jury; and, therefore, to give evidence to the jury that that letter was written under any conviction whatever, was to give evidence to the jury of an immaterial fact.

Several other questions of admissibility of evidence were raised and decided, but they are not deemed of sufficient importance to be reported.

The jury, after argument by *Mr. Swann* and *Mr. Key* for the United States, and *Mr. Coxe* and *Mr. Jones* for the defendant, retired on Saturday the 18th of July, at half past eleven o'clock, A. M., and returned at half past one, P. M., with the following verdict:

"The jurors in the case of the United States against Tobias Watkins, find him guilty of obtaining \$750 in his official capacity, and of applying the same to his own private use."

Mr. Coxe, for the defendant, insisted that the verdict must be received, and that it is not necessary that the jury should negative the residue of the matter charged in the indictment. The negative will be presumed. No objection of this kind has ever been sustained in a criminal case. 1 Chitty, Cr. L. 638; *Hawks v. Crofton*, 2 Burr. 698; 7 Bac. Ab. 22, 25, 28; 1 Chitty, 637, 647, 648.

THRUSTON, J., suggested that the safest course would be, to receive the verdict and hear the objections on a motion in arrest of judgment.

The COURT (THRUSTON, J., dissenting,) informed the jury that the Court had doubts whether they could, upon the verdict which the jury has offered to return, render a final judgment, either for or against the defendant; because the jury had not

found whether the money was obtained with a fraudulent intent, nor whether the money received was the money of the United States; and that if they wished to retire and reconsider their verdict in those particulars, the Court would permit them to do so.

THRUSTON, J., was of opinion that it was a dangerous practice to interfere at all with the verdict of the jury; and that the verdict, such as it was, ought to be received, and the objections heard on a motion in arrest of judgment.

The jury retired, and soon came back with the same verdict, only adding, after the figures \$750, the words "of the money of the United States," which verdict was received and recorded without objection by either party.

Mr. Coxe, for the defendant, moved the Court to enter up judgment for the defendant upon this verdict. And *Mr. Key*, for the United States, moved for a *venire de novo*.

In support of his motion, *Mr. Key* cited the following authorities. 1 Chitty, Cr. L. 646; *Rex v. Huggins*, 2 Lord Raym. 1585; *Woodfall's case*, 5 Bur. 2663; *Rex v. Hayes*, 2 Lord Raym. 1521; *Keat's case*, Skinner, 667; 2 Hawk. 47, § 9; 1 Chitty, 654; *Docker's case* in this Court.

Mr. Coxe, contra. Chitty does not say that, after a verdict has been received and recorded, *venire de novo* may be granted. If the jury find an immaterial verdict, and persist in it, they may be discharged, and a *venire de novo* awarded; but when the facts found are material, it is not a sufficient ground for a new *venire*, that facts enough are not found; but the court must give judgment on the facts found; and this rule applies to civil as well as criminal cases. So if the jury should be of opinion that the killing was *se defendendo*, they may say so without finding as to any other of the facts, or they may find a general verdict of not guilty. The facts not found are to be considered as found for the defendant, who is to be considered as innocent until all the facts are found which constitute his guilt. If the facts found are not sufficient to authorize a judgment against the defendant, there must be judgment of acquittal. 2 Hale, 302; *Rex v. Huggins*, 2 Str. 882, 887; *Francis' case*, 2 Str. 1015; *Woodfall's case*, 5 Bur. 2661, 2668; Jacob, Law Dict. 343, tit. Verdict; *Thompson v. Musser*, 1 Dall. 458; *Brockway v. Kinning*, 2 Johns. 210; *Bank of England v. Morris*, Rep. Temp. Hardwicke, 219, 229; *Rex v. Haynes*, 2 Lord Raym. 1518; S. C. 2 Str. 843; *Witham v. Levis*, 1 Wilson, 55; 6 Com. Dig. 250; Pleader, S. 26; *Rex v. Bigg*, 1 Str. 18; *Marten v. Jenkin*, 2 Str. 1145; 1 Chitty, 445, 647.

Mr. Key, in reply. All the cases in which a *venire de novo*

has been refused, are capital cases, and *in favorem vite*. *Huggin's case*, 2 Lord Raym. 1580; *The People v. Olcott*, 2 Johns. Ca. 301.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows: The jury after having been out some time, returned with the following verdict:

"The jurors, in the case of the United States against Tobias Watkins, find him guilty of obtaining \$750, in his official capacity, and of applying the same to his own private use."

The defendant's counsel insisted that the verdict should be received and recorded, but the counsel for the United States objected, on the ground that the verdict was imperfect. The Court desired the jury to retire while the Court should consider whether it was such a verdict as they could receive. After deliberation the Court sent for the jury, and informed them that the Court had doubts whether the Court could, upon the verdict which the jury had offered to return, give a final judgment either for or against the defendant, because the jury had not found whether the money was obtained by the defendant with a fraudulent intent; nor whether the money received was the money of the United States. And that if they wished to retire and reconsider their verdict in those particulars, the Court would permit them to do so. Whereupon the jury retired, and soon after returned the same verdict, with the addition of the words "of the money of the United States," after the figures \$750. This verdict was then received by the Court, and recorded without objection; and the jury was discharged.

The counsel for the United States have moved for a *venire de novo*; and the counsel for the defendant have moved the Court to enter judgment for the defendant.

The questions arising upon these motions, are, 1st. Whether the verdict is so imperfect that the Court cannot enter up any judgment whatever upon it? 2d. If any judgment can be rendered upon this verdict, what shall it be? 3d. If the Court cannot render a judgment upon it, can they order a *venire de novo*?

The counsel for the United States contend, that the verdict is so imperfect that no judgment can be given upon it, and that a *venire facias de novo* ought to be awarded. The counsel for the defendant contend, that enough is found by the jury to enable the Court to render judgment for the defendant.

It is urged by the defendant's counsel, 1. That by the Constitution of the United States, the defendant is not to be twice put in jeopardy.

2. That this verdict, having been received by the Court and

recorded, must be treated by the Court as a verdict of conviction, or of acquittal; otherwise the Court would not have received it, but would have kept the jury together until they had given such a verdict.

3. That the jury, by finding some of the material facts charged in the indictment, and being silent as to the others, must be considered as having found a verdict for the defendant upon the latter; and that, as they have not found, affirmatively, all the facts which are necessary to convict the defendant, he must be acquitted.

1. As to the first ground. The 5th amendment of the Constitution of the United States has these words, "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of his life or limb."

Without deciding whether this clause of the Constitution is applicable to misdemeanors, in which there can be no jeopardy of life or limb, it may be sufficient to say, that, if this verdict be so imperfect that no judgment can be given upon it, it must be considered as no verdict; and if the jury has been discharged without a verdict, the defendant has been in no jeopardy; and if it be such a verdict as will enable the Court to give a judgment upon it, the Court will proceed to render the judgment, and will not award a *venire de novo*.

2. The second ground is, that the Court has received and recorded the verdict, and must, therefore, consider it as a verdict of conviction or acquittal; for it must be a verdict of conviction or acquittal, or it must be no verdict; and if it had been no verdict, the Court would have kept the jury together until they had found one. "But," it is said, "after it has been deliberately accepted and recorded as a verdict, it must be conclusive some way;" and, in the language of one of the counsel for the defendant, "there is a complete estoppel against saying, there is no verdict."

The answer to this is, that the verdict, such as it was, was received and recorded without objection by the defendant or his counsel.

But no case can be found in which the Court was estopped, by the receipt and recording of the verdict, from saying that the verdict was so imperfect as not to justify a judgment.

3. But, 3dly, it is contended, that the jury by finding some of the material facts charged in the indictment, have, in effect, found for the defendant as to all the rest. It is said, that verdicts are of three kinds, general, partial, and special. That this is not a general nor a special verdict, but is a partial verdict, inasmuch as it finds only a part of the facts charged in the indict-

ment. Chitty, it is true, (Crim. Law, vol. 1, p. 636,) divides verdicts into those three classes, and defines them thus: "The verdict thus given is either general to the whole of the charge, partial as to part of it, or special, where the facts of the case alone, and the legal inference is referred to the judges."

But it may well be doubted whether a verdict which finds only one or two out of many facts which are all necessary to constitute the offence, and saying nothing of the residue, is such a partial verdict as is intended to be described by Mr. Chitty. The examples which he gives are all of a different character. They all find the defendant guilty of part of the charge, and expressly acquit him of the residue. Thus, he says, in p. 637, under the head of "partial verdict," "The jury may acquit the defendant of a part and find him guilty of the residue. Thus they may convict him upon one count of the indictment, and acquit him of the charge contained in another, or upon one part of a count capable of division, and not guilty of the other part; and on a count for composing and publishing a libel, the defendant may be found guilty of publishing only. And in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue." "And where the accusation includes an offence of an inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry. Upon an indictment for murder, he may be convicted of manslaughter; on an indictment on the statute of stabbing, he may be acquitted of the statutable offence, and found guilty of felonious homicide; on an indictment for stealing privately from the person, he may be found guilty of larceny only; on an indictment for grand, the offence may be reduced to petit larceny; robbery may be softened into felonious theft, and petit treason lessened to murder, or any description of less atrocious homicide; and on an indictment founded on a statute, the defendant may be found guilty at common law."

These are all the examples given by Mr. Chitty; and in no one of them is it intimated that a verdict, finding some, only, of many facts necessary to constitute the offence, without negating the residue, has been considered as a verdict of acquittal, or even as a partial verdict, within his idea of the term. This verdict, therefore, is not included in Mr. Chitty's class of partial verdicts. It certainly is not a general verdict, nor a special verdict. If it be neither of these, it cannot be a verdict. The

jury may, indeed, find a fact or facts, inconsistent with the guilt of the defendant, without undertaking to find all the facts, as in a special verdict; but, in that case, it seems probable that it would be considered by the court, and ordered to be recorded by the clerk, as a general verdict of not guilty. Thus, in the case of *Hawks v. Grafton*, 2 Burr. 698, which was an action of trespass, the pleas were — not guilty, as to the *vi et armis*; and *son assault demesne*, as to the special damages. The verdict was — “guilty of the trespass within written.” The question was, whether the verdict was so uncertain as to require a *venire de novo*. Lord Mansfield said — “That where the intention of the jury is manifest, and beyond doubt, the court will set right matters of form, and the mere act of the clerk; and I think the present case is such a clear case, that the court may here give judgment upon the substantial finding, though the clerk may have been irregular and faulty in point of form. It is very clear what the jury meant.” The other judges concurred; and Mr. Justice Dennison said — “Verdicts are not to be taken strictly, like pleadings; but the court will collect the meaning of the jury, if they give such a verdict that the court can understand them.” And he says that the rule laid down by Hobart, 54, was a very just rule, where he says — “But howsoever the verdict seem to stray, and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet, if a verdict may be concluded out of it to the point in issue, the court will work it into form, and make it serve.”

So if the defendant were to plead specially, and deny the existence of one of the material facts charged, which constitute the offence, such plea would, in effect, amount to the general issue; and a verdict, finding the issue for the defendant on that single fact would, in effect, be equivalent to a general verdict on the general issue.

If, therefore, upon the general issue, the jury should find the same fact for the defendant, such a verdict would also, in effect, amount to a general verdict, and ought to be so entered by the clerk.

So, also, a verdict in a criminal case, finding a fact which, if specially pleaded, would be a good defence, would be considered by the court, and entered as a general verdict. So, also, if the jury find a fact which is inconsistent with the guilt of the defendant. In all these cases, the intention of the jury would, in the language of Lord Mansfield, be “manifest, and beyond doubt,” and the court “would set right matters of form, and the mere act of the clerk.”

But, in the present case, the intention of the jury is not

manifest, and beyond doubt. The facts which the jury have found neither establish, nor are inconsistent with, the guilt or the innocence of the defendant, as to the crime with which he is charged.

A number of cases, however, have been cited, with a view to show that when the jury has found some of the material facts against the defendant, but not enough to convict him, all the rest are considered as having been found in his favor; and that, "from the absence of matter of conviction in the verdict, acquittal results."

But all the cases cited to establish that principle, are cases of special verdict.

A special verdict professes to find all the material facts which have been proved to the satisfaction of the jury, and concludes that if, upon the facts so found, the court should be of opinion that the defendant is, in law, guilty, then the jury find him guilty; but if, upon the facts thus found, the court should be of opinion that the defendant is not, in law, guilty, then they find him not guilty. If, therefore, the jury should have found only a part of the facts which are necessary to constitute the crime, the court cannot say that, in law, the defendant is guilty; and, if they cannot say he is guilty, they must, upon the same facts, say that he is not guilty. This shows the reason why, in the case of *Huggins*, (2 Lord Raym. 1585,) "though search was made with the greatest diligence, yet they could not find one instance, or so much as an opinion of a judge," that a *venire de novo*, in a criminal case, was granted after a special verdict.

But it is not said that a *venire de novo* could not be granted, when the verdict was neither a general nor a special, but an imperfect verdict. This verdict does not profess to be, and does not, in effect, amount to a general verdict, and does not profess to find all the facts proved, to the satisfaction of the jury; nor to refer any matter of law to the Court; nor to negative any one of the material facts necessary to constitute the offence charged in the indictment; nor to find any fact inconsistent with the guilt of the defendant.

This is so different from a special verdict, that it can hardly be necessary to say, that the precedents of judgments upon special verdicts are not applicable to it.

The following cases, cited by the defendant's counsel, were all upon special verdicts. *Rex v. Keile*, 1 Lord Raym. 141; *Rex v. Huggins*, 2 Lord Raym. 1585; *Rex v. Hayes*, 2 Lord Raym. 1518; *Rex v. Francis*, 2 Str. 1015; and *Witham v. Lewis*, 1 Wilson, 55. So also were the following cases. *Plummer's*

case, Kelyng's Rep. 111; *Green's case* and *Bedell's case*, Kelyng, 79; and *Tonson's case*, Kelyng, 66.

We have said, that the verdict does not find any fact inconsistent with the guilt of the defendant.

It is true that the jury have found that he received the money in his official capacity. It might, perhaps, be a sufficient answer to say that the question, — What were the official powers, authority, and duty of the Fourth Auditor of the Treasury Department of the United States? is a question of law, and that he had no official authority to get the money into his own hands; that it was no part of his duty to disburse any of the money appropriated for arrearages prior to 1827; nor had he an official right to receive it.

But the Court is of opinion that, if by deceitful practices, or false pretences, he received it, either officially, or under color of his office, with intent to appropriate it unlawfully to his own private use, it was not less a fraud than if he had not received it officially, or under color of his office. The fact, therefore, that he received it in his official capacity, is immaterial to the issue.

This verdict, therefore, is imperfect:

1st. Because it does not profess to find all the material facts proved to the satisfaction of the jury, and submit the matter of law to the Court, and find for or against the defendant, according as the opinion of the Court should be upon the law; which would make it a special verdict.

2d. Because it does not negative any one of the facts necessary to constitute the offence charged; nor find any fact inconsistent with the guilt of the defendant, which would, in effect, amount to a general verdict.

3d. Because it does not find the defendant guilty of a less offence, included in the offence charged, and acquit him of the greater, as in the case of finding manslaughter upon an indictment for murder, which would bring the case within the class of partial verdicts, as it is defined by Mr. Chitty; and

4th. Because it does not find all the facts necessary to constitute the offence charged in the indictment.

The Court, therefore, cannot render a judgment upon it, either for or against the defendant.

The only remaining question is, whether, in such a case, the Court can order a writ of *venire facias de novo*?

This question is too clearly settled, to admit of a doubt in cases of misdemeanor. The only cases in which it has been doubted were capital cases, after a special verdict finding the prisoner not guilty, if the court should be of opinion, upon the

facts found, that he was not, in law, guilty. Upon such a verdict the courts have always acquitted the prisoner, if the special verdict did not find all the facts necessary, in law, to establish his guilt; and this, because such is the express verdict of the jury. A special verdict, it is true, is at first conditional; but, when the court has decided the condition, the verdict becomes absolute.

The only case in which a doubt was ever suggested, as appears from the diligent search made in *Huggins's case*, was *Keate's case*, 1 Lord Raym. 141, in which Lord Holt seems to have thrown out a *dictum*, that if the verdict, in that case, was uncertain, no judgment could be given; but a *venire de novo* ought to issue. But the court was divided upon the question, whether the verdict was uncertain. Three of the judges, however, expressed an opinion, which was not contested, that, if it were so uncertain that judgment could not be given upon it, a *venire de novo* ought to issue.

But, in regard to misdemeanors, we do not find any case in which the right of the court to issue a *venire de novo*, upon an imperfect verdict, has been questioned.

Co. Lit. 227 a, says — “A verdict, finding matter uncertainly or ambiguously, is insufficient, and no judgment shall be given thereupon.” “A verdict, that finds part of the issue, and finds nothing for the residue, is insufficient for the whole; because they have not tried the whole issue with which they were charged.”

1 Chitty, Crim. Law, 646 — “Where the verdict is so imperfect that no judgment can be given on it, it is certain that, in case of misdemeanor, a *venire de novo* may be awarded.” So in the case of *The King v. The Dean of St. Asaph*, 3 T. R. 128, (428), in notes, Lord Mansfield said — “If the verdict were defective, and omitted finding any thing within the province of the jury to find, no judgment could be given, and there must be a *venire de novo*.”

So in *Patterson v. The United States*, 2 Wheat. 225, Mr. Justice Washington, in delivering the opinion of the Supreme Court of the United States, said — “The rule of law is precise in this point. A verdict is bad, if it varies from the issue in a substantial matter; or if it find only a part of that which is in issue. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court, in which the cause is tried, may give form to a general finding, so as to make it harmonize with the issue, yet if it appear to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in

issue, no judgment can be rendered upon the verdict." In that case the judgment was reversed, and a *venire facias de novo* was ordered to be issued by the Circuit Court.

So, also, in the case of *The People v. Olcott*, 2 Johns. Cas. 301, for conspiracy. The verdict offered by the jury was—"That there was an agreement between Roe and the prisoner, to obtain money from the Bank of New York, but with intent to return it again;" the court considered it an imperfect verdict, refused to receive it, and sent the jury back several times. But the jury refusing to find any other verdict, and having been out a long time, the court discharged them without the prisoner's consent. In that case, two points were decided by the Supreme Court of New York:

1st. That the court had a right to discharge the jury, under such circumstances, without the prisoner's consent; and,

2d. That the finding was so imperfect, that, had it been received, the court could not have given judgment upon it, and would have been obliged to award a *venire de novo*.

Chief Justice Kent, in delivering the opinion of the court, said: "The offence charged was a conspiracy to defraud the bank, and the verdict was, 'That there was an agreement between Roe and the defendant to obtain money from the bank, but with intent to return it again.' This, however, is no answer to the substance of the charge, which was the unlawful and fraudulent intent to procure money from the bank. That finding leaves the truth or falsity of the accusation in equal uncertainty. The intent afterwards to return the money might consist equally with a fraudulent or an innocent intent to procure the money in the first instance. The finding was, therefore, so imperfect that had it been received the court could not have given judgment upon it, and would have been obliged to award a *venire de novo*. The jury might have found either a special verdict, stating the facts at large, and leaving the law to the court; or by a general verdict they ought to have affirmed or negatived the fraudulent intent. I am satisfied that this is no verdict of acquittal. If it had any operation it would be against the defendant; for, in answer to the indictment, the jury have found the fact that the defendant and Roe did agree together to obtain money from the bank, and they have not negatived the fraudulent intent."

Upon the whole, this Court is of opinion that this verdict is so imperfect that no judgment can be rendered upon it, and that a *venire facias de novo* must be awarded.

Mr. Key, for the United States, moved the Court to deliver the opinion, which it had been stated by the Court was, on the

demurrer to the indictment for falsely altering the abstract B, prepared on the question argued before the Court on that indictment, whether such alteration, in the manner and with the intent charged in that indictment, amounted to forgery at common law; the Court having thought it unnecessary to deliver any opinion on that question, because they adjudged the indictment insufficient for want of the technical term "forge."

The counsel for the United States stated that they considered it their duty to ask the Court for their opinion upon that point, because (as the Court saw from the evidence given on the former trials,) there was another abstract (abstract C,) altered and erased in the same manner, and under similar circumstances; that it was their duty to send up an indictment for the alteration and erasure of this second abstract, as a forgery at common law, unless they were apprised that the Court's opinion was that such an alteration of such a paper under all the circumstances, and with the intent charged in relation to the other abstract (abstract B,) did not amount to a forgery. It was, therefore, necessary that the United States counsel should know whether such was the opinion of the Court or not, in order that they might govern themselves, in the discharge of their duty, accordingly. Which motion to deliver now an opinion in the cause alluded to by the counsel for the United States, this COURT (THRUSTON, J., *contrà*,) overruled, because that cause has been decided, and is not now judicially before the Court; and because, although one of the judges, supposing that it might be necessary in that case to give an opinion upon the question alluded to in this motion, had written an opinion which would, perhaps, have been delivered as the opinion of the Court if it had been necessary, at that time, to give an opinion upon that point; yet two of the judges were not perfectly satisfied with that opinion, and were desirous of further time to consider it; and finding it to be unnecessary, refused to give the opinion for that reason, and because it would have been unnecessary to commit the Court upon a very important point which might have afterwards arisen in the trial of the cause; and for the same reason the Court now refuses to give an opinion upon that point.

Mr. Key, for the United States, then made the following motion, in these words:

The counsel for the United States (the Court having declined delivering their opinion as applied for in the preceding motion,) then moved the Court to instruct the grand jury upon the law in reference to the said abstract C's being such a paper as could be the subject of forgery at common law; and whether the facts

and intents charged in the former indictment for the alteration of abstract B, and stated in the indictment now submitted to the Court, and about to be sent up to the grand jury for the alteration of the abstract C, amounted to forgery at common law, or not.

Also to instruct them that it was the duty of the grand jury, if they found the facts and intents as charged in the indictment, to find it, notwithstanding it contained the word "forge."

The COURT (THRUSTON, J., *contrà*.) refused to instruct the grand jury as required, saying "that their reasons will appear in the opinion already given upon the motion to instruct the grand jury in a former case against this defendant; for although all the reasons for refusing it in that case do not exist in the present, yet many of them do, and, in their opinion, enough to make it their duty to overrule the motion."

The trial of the case upon the transaction with Mr. Paulding for \$300 commenced on the 20th of July.

Mr. Key, for the United States, suggested that the jurors who tried the former cause should be excluded from the panel for the trial of this cause; and that as there were not twelve other jurors attending, the marshal should be directed to summon talesmen to complete the panel.

Mr. Coxe, for the defendant, objected. This is entirely a new cause; and there is no legal objection to the jurors who tried the other.

CRANCH, C. J., said that he did not perceive any legal objection to the former jurors; and if there was not, there was no defect of jurors, and the Court would have no authority to order talesmen; and if we did so, it might be the ground for a new trial; that his only motive for this suggestion was that we may not be drawn into a new trial. He then suggested that jurors who were not on the former trial should be first called, and the deficiency made up by drawing from the names of the former jury; but *Mr. Coxe* would not agree to this, and the Court ordered all the names of the attending jurors to be returned to the box, and twelve drawn out by lot, by the clerk, which was done.

The panel being called into the jury box, and one of the jurors, *Mr. Haller*, being called to the book to be sworn, and being asked by the counsel of the United States, "whether he had formed and expressed any opinion respecting the innocence or guilt of the defendant upon the present indictment," said he did not know what the charge was; whereupon the Court directed the indictment to be read in the hearing of the whole panel. The jurors were then respectively asked the same question as they came to the book to be sworn.

The jurors who had been upon the former panel answered that they had formed and expressed an opinion as to the manner in which the defendant obtained the money. They were then separately challenged for favor and tried by the triors, and then each respectively was sworn as a witness to the triors, who were sworn upon each challenge. See the form of the oath in 1 Chitty, and in Harris's Entries. The following authorities were cited: Trials *per pais*, 187, 189, 204; 2 Halstead, 220, note to *Teller's case*; Anon., 1 Salk. 153; *Resp v. Dennie*, 4 Yeates, 267.

After two or three hours, only four jurors were sworn in chief, and the marshal was ordered to summon eight talesmen for the next morning.

Mr. Robert Beverly having been challenged for favor by the defendant's counsel, the two triors could not agree.

The COURT (*nem. con.*) said, that it seems by the books that only two triors can be chosen. Every juror is presumed to be indifferent until the contrary appears; and if the party challenging for favor does not support his challenge with effect, the juror must be sworn. Mr. Beverly was then sworn in chief.

Before Mr. Beverly was sworn, Mr. Stettinius, having been asked the usual question, whether he had formed and expressed any opinion respecting the guilt or innocence of the defendant upon this indictment, which was read to him, answered that he had not, and was sworn in chief without objection. After he was thus sworn and had taken his seat, he rose and informed the Court that he had formed and expressed an opinion upon the matters contained in the former indictment (for \$750) upon which the jury had given their verdict.

The Court said that as the juror was sworn, no exception could now be taken to him unless by consent.

The counsel for the defendant, Mr. Coxe, refused to consent to his being now challenged.

Mr. Key contended that this was not a challenge by either of the parties, but was a challenge by the juror himself, and therefore not within the rule. That this was good cause for a new trial, and it could not be worse to reject him, for the rejection would only be a ground for a motion for a new trial, which the Court would not grant if they should be satisfied that the juror was not really prejudiced.

The COURT (*nem. con.*) said, that as the juror was sworn, they could not discharge him without the consent of the defendant.

Of the eight talesmen ordered and summoned, only one was sworn, and only one of seven others who were summoned in the course of the day. The Court ordered six more to be summoned for the next day.

Wednesday, July 22. With great difficulty five jurors were obtained this day, making eleven ; and ordered one to be summoned for tomorrow.

Thursday, July 23. This day the panel was completed.

Mr. Key, for the United States, then moved the Court to discharge *Mr. Stettinius*, one of the jurors, who had been sworn as before mentioned ; or to permit the United States now to challenge him, unless the counsel for the defendant would say that he did not object to him.

CRANCH, C. J., said, that when a *tales* is returned, the parties have a right to challenge any one of the original panel who has been formerly sworn in chief, but it must be for a cause arising after he was sworn ; not for a cause existing before he was sworn, although it did not come to the knowledge of the party until after he was sworn ; and that the Court could not, *ex mero motu*, or even upon the motion of the counsel for the United States, discharge a juror who had been sworn in chief, without challenge, because the juror had disclosed to the Court matter, which might be given in evidence upon a challenge. And that he understood this to be the opinion of the Court ; to which the other judges did not express any dissent.

In the course of the trial, *Mr. Key*, for the United States, prayed the Court to instruct the jury, " That whether the letter and draft were written and drawn by the defendant, in his private capacity or in his public capacity, if they were done ostensibly for the public service, but fraudulently, for his own private use and benefit, and the United States' agent was thereby imposed upon ; and the money obtained on the draft thus applied to his private use, and the United States thus defrauded of the said \$300, the jury should find the prisoner guilty on this indictment."

This prayer was submitted without argument, and, on the following morning,

The COURT (*THRUSTON*, J., absent,) gave the following opinion and instruction :

The Court, being of opinion that the offence charged in this indictment is not charged as an official offence only, but is an offence at common law, whether committed by official means or not, the question, whether this Court has jurisdiction of an offence consisting exclusively of official misconduct of any officer of the United States, does not necessarily arise in this cause, and is not intended to be decided by the Court. But the Court is of opinion that it has jurisdiction of any common-law offence committed in this county, by an officer of the Government of the United States, of which it would have juris-

diction if committed by a person not an officer of the Government of the United States, although such offence should have been committed by such officer of the government of the United States by means consisting, in part, of acts done by virtue, or by color of his office.

The Court, therefore, upon the motion of the counsel for the United States, instructs the jury as follows :

That if the jury should be satisfied, by the evidence in this cause, that the letter and draft, in the indictment set forth, were respectively written and drawn by the defendant, in manner and form, at the time and place, and with the intent therein set forth, either in his private capacity, or in his public capacity, as Fourth Auditor of the Treasury Department of the United States, ostensibly for the public service of the United States, but fraudulently, for his own private use and benefit, with intent to defraud the United States of the sum of money in the said draft mentioned ; and that the said J. K. Paulding, the Navy Agent named in the said indictment, was thereby deceived, and induced to believe that the said letter and draft were respectively written and drawn by the defendant for the public service of the United States, and, in consequence of being so deceived and induced to believe, did pay the said draft out of the money of the United States then in his hands ; and that the defendant received the money for the said draft, as stated in the said indictment, and that all the other facts stated in the said indictment are true, as therein stated, and that the defendant did thereby defraud the United States of the said sum of \$300, in the said draft mentioned, then they ought to find the defendant guilty upon this indictment.

The jury having been out thirty hours, and not being able to agree on a verdict, were discharged on Saturday evening, 25th July.

On the 3d of August, the trial of the defendant, upon the three indictments, came on, namely, 1st. Upon the transaction with Mr. Paulding, for \$750 ; 2d. Upon the transaction with the same, for \$300 ; 3d. Upon the transaction with Mr. Harris, for \$2,000 ; the latter being a new indictment upon the same matter as that contained in the former indictment upon the same transaction, which had been adjudged insufficient upon demurrer.

Tuesday, August 4. The COURT (THRUSTON, J., absent,) gave the same instruction in the case for \$300, which they had given in the former trial of the same case.

Mr. Coxe, for the defendant, was about to argue the law to

the jury, in opposition to the instruction which the Court had just given; but

The COURT (THRUSTON, J., absent,) interrupted him, by saying that, according to the uniform practice of the Court, the counsel are not permitted to argue the question of law to the jury, which has been submitted by both parties to the Court, and by them decided, and the jury thereupon instructed. That the only way in which the jury can decide the law of a case is, by giving a general verdict, which necessarily involves the question of law as well as of fact.

Mr. Coxe observed, that he had had no opportunity of arguing, before the Court, the questions of law involved in that instruction.

CRANCH, C. J., replied that the instruction asked by *Mr. Key*, (meaning on the 23d of July, 1829, [*ante*, 580,]) was understood by the Court as having been submitted to the Court, by the counsel for both sides, when the Court adjourned; and that, on the next morning, when the Court suggested to the counsel the instruction which they thought they ought to give, they had an opportunity of objecting, and arguing the law involved in the proposed instruction, which the Court then said they considered as being, in substance, the same as had been asked by the counsel of the United States.

Mr. Coxe said he thought it varied substantially from that which was asked; and it was only the propriety of that which was asked that he agreed to submit to the Court. And that the Court, by not giving that, had decided the question in his favor.

CRANCH, C. J., said, that so far as the Court had instructed the jury upon the questions of law involved in *Mr. Key's* prayer, and submitted to the Court by the counsel on both sides, the Court could not permit the same questions of law to be argued before the jury, in contradiction to the instruction given by the Court. But if the instruction actually given exceeded the matter submitted to the Court, and involved questions of law not involved in the instruction asked, he was at liberty to argue before the jury any such questions of law as were not involved in the instructions asked and submitted to the Court.

Mr. Coxe replied that it was difficult to separate them, and to confine his observations to them; and contended that he had a right to argue the whole law of the case to the jury; and referred to *Mr. Rodney's* argument in the impeachment of Judge Chase, upon the matter of *Frye's* trial. 2 Chase's Trial, 421.

The COURT again informed him that he might argue to the

jury any question of law, not submitted to and decided by the Court.

MORSELL, J., observed that he should have no objection to withdraw the instruction, and permit Mr. Coxe to argue the law to the jury, if the counsel for the United States would withdraw their prayer until the argument should be concluded; and

CRANCH, C. J., said, that if the counsel for the United States would withdraw their prayer, the Court would withdraw their instruction; which was done, and *Mr. Coxe* proceeded to argue the law to the jury.

Mr. Key then moved the Court to give the instruction which had been withdrawn; which was done.

Mr. Coxe then moved the Court to instruct the jury, 1st. "That if they believe that the defendant had, by law, no authority to direct the disposition of money in the hands of the Navy Agents, the payments made by them, of the various drafts, was unauthorized, and in their own wrong; and, 2d. "That if the jury shall believe that the Fourth Auditor had lawful power and authority to direct the appropriation of such money, then the Navy Agents were bound to pay the official drafts of the Fourth Auditor, and none other."

The COURT refused these two instructions;

1st. Because, to give them, would be to submit to the jury matter of law.

2d. Because, if the defendant had, in law, no such authority, yet he might, by false appearances, deceive the Navy Agent into a belief that he had such authority, so as to induce him to pay the drafts out of the money of the United States; and although, in such case, he might, in law, pay the same in his own wrong, and without actual authority, yet it might be a fraud upon the United States.

3d. Because, although the defendant might have had authority to direct the appropriation, still he might do it in such a way as to deceive the agent, or otherwise to use such deceptive practices in regard to it, as to constitute the drafts a fraud upon the United States.

Mr. Key then prayed the Court to instruct the jury, that if they believed, from the evidence, that the defendant obtained the money of the United States fraudulently, and in the manner charged in the indictments, then the circumstance of the government's having since allowed a credit to the said Navy Agents, Paulding and Harris, for the amounts of the drafts drawn on them by the defendant, and paid by them, does not sanction those drafts by the defendant, nor exculpate him from the

offences charged in the said indictments; nor does the circumstance of the officers of the government having entered the amount of these drafts as a charge upon the defendant, exculpate him from the offences charged in the said indictments;

Which instruction the COURT gave, (THRUSTON, J., absent,) and also the following, at the prayer of the counsel for the United States :

That although the drafts mentioned in these indictments were ultimately paid by the said Harris and Paulding, respectively, at Boston and New York, still, if the defendant obtained the amount of the said drafts of the said C. S. Fowler, in the city of Washington, in the manner charged in these indictments, and procured the issuing of the requisition in the manner charged, then the said ultimate payment of the said drafts in Boston and New York, respectively, does not prevent this Court from having jurisdiction to try the offences charged in the said indictments.

Mr. Coxe, in arguing to the jury, cited 2 Wilson's Lectures, 247, as to the right of the jury to decide the law; and *Mr. Key* cited, upon the same point, Addison's Rep. 57.

The jury, having been out an hour, returned a verdict of "guilty" upon each indictment.

Mr. Coxe, for the defendant, moved in arrest of judgment, and for a new trial.

On Thursday, August 13th, 1829, the motions were argued by *Mr. Coxe*, for the defendant, and by *Mr. Swann*, for the United States.

Mr. Coxe said it was not his wish, or intention, again to present the same views which were submitted on the former arguments; but to express his sincere conviction of the legality of the grounds for which he had before contended, and to press upon the Court the great importance of them, not only to the defendant, but to the nation, and to solicit a calm review of the questions which these cases present.

The Government of the United States is composed of three distinct branches; executive, legislative, and judicial. They are coördinate; and each, in its particular sphere, independent of the others. No judicial tribunal should attempt to exercise any jurisdiction over the executive department, other than that which is conferred by positive statute. This Court has, on former occasions, issued injunctions against some of the officers of the Treasury Department to restrain them from paying money to one party which is claimed by another. In some instances they have been obeyed, in others disregarded. But when they have been respected, it has been more out of courtesy than a belief

of any obligation to do so. The present head of the Treasury Department, expressly disavows the authority of this Court to suspend any of his official acts; and, indeed, it would be hard to conceive the extent of evil which might result, if a court of justice should be authorized by its writ issued upon the *ex parte* affidavit of a complainant to suspend its money payments; an act which might shake the credit of the government, and destroy all confidence in its good faith. The executive department consists, not only of the President, but of the heads of departments, and the various subordinate officers, who are all equally shielded from the action of this Court, as the President himself, and for the same reasons. The 4th Auditor of the Treasury is one of these functionaries. He is bound to perform the duties required of him by the act of Congress which creates his office, and confers his powers. He is responsible to the President, whose officer and agent he is, and to no other authority, unless made so by some act of Congress. His acts are executive acts, and cannot be judicially inquired into; still less can they be subjected to examination in a State court, or under the criminal common law of a State. He cannot be subjected to the jurisdiction of any court, unless, in the exercise of his official power, he invades the rights of an individual, and thus gives him a cause of action. If, however, under any circumstances he can be made amenable to any criminal law, it must be before a tribunal created under the authority of the same government, and administering that law which furnishes to him his rule of duty; that law which creates his office, defines its duties and its powers, and limits its responsibilities.

Mr. Coxe, here cited the case of *Mostyn v. Fabrigas*, Cowp. 161, and S. C. 11, Hargrave's State Trials, 162, in which *Lord Mansfield* and the court decided that the question of the powers of the Governor of Minorca, under the king's letters patent, could be tried only in the king's courts in England. The authority of an officer, *Mr. Coxe* argued, can be measured and ascertained only by reference to the law which confers it. These indictments are framed upon the common law of Maryland. By what law are we to decide whether the accused be guilty or innocent? Must we not look to the laws of the United States, to see what powers are reposed in the 4th Auditor? what acts he may do, and what he may not? Must we not look to those laws to see whether such an officer exists or not; and to ascertain his duties and his responsibilities? If he has exercised no power but what those laws confer, he has transcended no authority, he has violated no duty. Can it then be contended that a Maryland court, administering the Maryland law, is

obliged to look to another law to see whether an offence has or has not been committed; and, when that fact is ascertained, to consider it a crime over which it can assume jurisdiction? This prosecution, it is now settled, is to be sustained upon the principles of the common-law of Maryland alone. The only inquiry that can be made is, whether the auditor has not transcended the powers conferred upon him by the act of Congress, and it seems extraordinary that the violation of an act of Congress, should constitute an offence at common law, in the State of Maryland. The common law of Maryland is a unit. It contains within itself every provision that is necessary to indicate and define the offence, to provide for, and to meet every possible aspect of it, and to prescribe the punishment. It cannot look abroad into another system of law to ascertain the guilt or innocence of actions; it must find them within itself. This common law is of unlimited antiquity. It cannot now create new offences, and affix to them new punishments. How then is it conceivable, that this common law, existing in Maryland anterior to our Revolution, can contain any provision prohibiting a violation of an act of Congress when that Congress itself had no existence. The federal government created the office, and Congress has defined the powers of the officer. He has a control over the funds of the public in the hands of the Navy Agent. If he has exercised that control improperly—if he has misapplied those funds—what law has he violated? Clearly, that alone which prescribed his duties. If he has no such power, then all his acts are extra-official, and he can be regarded in no other light than a private individual, whose representations, whether written or oral, to the Secretary of the Navy, and the Navy Agents, were entitled to no consideration from them, and which they were bound to disregard. If he had such a control, it was necessarily an official control only, and his improper exercise of it could be nothing but a malversation in office. Official misconduct cannot, in any case, be the subject of criminal prosecution under our Constitution. *Mr. Coxe* here cited the opinion of the Supreme Court, in the case of *Marbury v. Madison*, 1 Cranch. 165, 170.

The case of *Marbury v. Madison*, was that of an application to the Supreme Court for a *mandamus* to be directed to the Secretary of State commanding him to deliver to the relator a commission which had been made out and signed and sealed by the President. The withholding of that commission was held to be illegal, and contrary to duty; but not, therefore, unofficial. It was held to be an infringement of the vested rights of an individual, and, therefore such official act was cognizable at the

instance of that individual in a court of justice. But all right to examine into the official conduct of an executive officer where no private rights were violated, is expressly disclaimed.

What acts can be more purely and exclusively official and executive in their character, than the control exercised by the Treasury Department over the public moneys? The 4th Auditor is empowered to receive, adjust, and settle the accounts of persons having claims against the Navy Department, and to direct the disposition of the funds in the hands of the Navy Agents. Should he refuse to allow an item of charge in an account presented by an individual, can this Court assume jurisdiction over him, and compel him to do it? This would be to make this Court a comptroller. If, in controlling these public funds, the same officer should direct the payment of an account which had been improperly allowed, can this Court reëxamine the allowance, and decide that he was wrong? The whole matter is referred to him, to his intelligence, to his discretion, and to his integrity—and no judicial tribunal is empowered to enter his office, and inquire into the manner in which he has performed his public duties, or directed the disposition of the public money. But that this power should be derived from the Maryland common law, seems preposterous and paradoxical. The common law of Maryland is completely within the control of the legislature of that State, and if we are to refer to it as the standard by which to judge of the conduct of an officer of the general government in the discharge of his official duties, we refer to a standard which not only can furnish us with but a very uncertain rule, but one which may be changed by the caprice or whim, or policy of the State government.

If the acts now charged against the accused be violations of that law, and triable in the courts of that State, the legislature may frame a system of statutory law, creating new offences, limiting and defining the duties of every officer of the general government, making that punishable which is now allowed, prohibiting that which is now commanded, and measuring, at their will, the penalties of disobedience.

If this jurisdiction is claimed in consequence of the peculiar organization of this district, or the peculiar character of this Court, it has been heretofore shown, that it must refer to some other origin than that of the common law. But the assumption of this enormous power will never be acquiesced in by the people of the United States. They will never submit to see their officers subjected to this jurisdiction, of which they have never heard, and tried by a law which they know not of; a law which they never made, and whose authority they have never recognized.

Mr. Coxe then proceeded to consider the other grounds which he supposed to be good grounds for arresting the judgment.

The indictment in the case for \$750, contains two sets of averments, and is uncertain and multifarious. The first sets forth the manner in which the money was drawn out of the hands of the agent by the defendant; the second, the manner in which the money of the United States was placed in the hands of the agents. It is uncertain whether the offence alleged is the fraudulent obtaining of the money of the United States, from the Navy Agents; or that of fraudulently placing the money in their hands. It is also uncertain as to the time and place of committing the offence. The words "then and there" may refer to different times before stated in the indictment.

Upon the motion for a new trial, *Mr. Coxe* contended that the verdict was against the evidence in the cause.

Mr. Swann, contra, contended that the question of jurisdiction had been already solemnly decided by the Court, in this cause, and upon very solid grounds, and he replied to the objections made to the indictments.

CRANCH, C. J., delivered the opinion of the Court, as follows: The defendant having been convicted upon three indictments, his counsel has made a motion in arrest of judgment, and for a new trial.

The first of these indictments is that which was founded upon the draft for \$750 upon *Mr. Paulding*, the Navy Agent at New York, and which the Court, upon the demurrer, had decided to be good.

The second is upon the draft on *Mr. Paulding* for \$300, to which a demurrer had been heretofore entered and argued, and withdrawn at the suggestion of the Court.

The third is a new indictment upon a transaction with *Mr. Harris*, the Navy Agent at Boston, on which a former indictment was framed which was adjudged bad on demurrer.

Upon the argument on the motion in arrest of judgment, the same exception has been taken to the jurisdiction of this Court which was taken and overruled upon the demurrer.

In support of the exception it is said, that in deciding upon the guilt or innocence of the defendant upon these indictments, it is necessary to inquire into the extent of his powers and duties as 4th Auditor of the Treasury Department of the United States, and that no tribunal is competent to make that inquiry judicially but a tribunal purely and exclusively national; indeed, it seemed to be denied that any judicial tribunal whatever was competent to question his official acts, unless they violated the vested right of some individual; and that, if they affected the public only, he must be left to his superior executive officer.

Upon this point the Court was referred to the opinion of Lord Mansfield in the case of *Mostyn v. Fabrigas*, Cowper, 173, 174, and to the opinion of the Supreme Court of the United States in the case of *Marbury v. Madison*, 1 Cranch, 165, 166.

In the first case, Fabrigas, a native of Minorca, brought an action of assault and battery and false imprisonment, in England, against Mostyn, who was governor of Minorca by virtue of letters patent from the king. Lord Mansfield said: "Now if every thing committed within that dominion is triable by the courts within that dominion, yet the effect or extent of the king's letters patent, which gave the authority, can only be tried in the king's courts; for no question concerning the seignory can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the king's courts in England only, so that, emphatically, the governor must be tried in England, to see whether he has exercised the authority delegated to him by his letters patent, legally and properly; or whether he has abused it in violation of the laws of England, and the trust reposed in him."

The doctrine established by this citation is, that the extent of the powers of the officers cannot be decided by those officers themselves, but must be decided by the courts of the king who granted the authority.

The passage cited from the opinion of the Supreme Court of the United States, in the case of *Marbury v. Madison*, is this:

"It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend upon the nature of that act.

"If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

"By the Constitution of the United States, the President is invested with certain important political powers, in the execution of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation—not individual rights;

and being intrusted to the executive, the decision of the executive is conclusive.

“The application of this remark will be perceived by adverting to the act of Congress for establishing the department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is, so far, the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

“The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.”

It seems, to this Court, perfectly clear that these authorities, and the argument to be drawn from them, apply only to cases of exclusively official acts.

In the present cases, the offences are not charged as official misdemeanors, nor is the official character of the defendant a necessary ingredient in any of them. It only afforded him the means of deceit by which he was enabled to effect the alleged fraud. The Court having, in former stages of these prosecutions, expressed its opinion fully upon this point, does not deem it necessary to say more now than that it has seen no reason to change that opinion.

In the case for \$750, it has been urged that two offences are charged in the same count, if the indictment in the case for \$300 be good; for the only offence charged in the latter consists in the letter and draft, whereas the former charges not only a similar letter and draft, but a distinct fraud in obtaining a requisition.

It will be observed, however, that in the case for \$750, the letter and draft are not set forth with the same averments of the intent to deceive by the official appearance given to the letter, which accompany the charge in the case for \$300, and which

materially distinguish the indictment in that case from the former indictment upon the same transaction, which the Court upon demurrer adjudged to be insufficient. The Court, after reviewing its former opinion that the indictment for the \$750, drawn from Mr. Paulding, does not contain two distinct charges of two distinct offences, has seen no cause to alter that opinion.

The principal objection to the former indictment in the case for \$300, noticed by the Court in its opinion upon the demurrer in that case, was that it did not aver any deceitful practice by which the money was obtained; it only stated what might be evidence of deceitful practice; it did not aver the facts which the jury might infer from the facts averred. The Court stated, in substance, that fraud was an inference of law from certain facts, and that it was not sufficient to set forth that certain facts were done with a fraudulent intent, but that the facts themselves must be such as to justify the legal inference of fraud; "that there was no fact averred, in relation to the letter, or the draft, or the requisition, which showed any deceitful practice — any attempt to deceive any body, or to impose on any agent of the government. That the simple averment that the defendant wrote the letter is not the averment of any fact which might be inferred from the fact of his writing the letter. So in regard to the averments respecting the draft and the requisition, and the receipt and misapplication of the money, they do not amount to any inference which might be drawn from either of those facts, or from the combination of the whole. Whatever material inferences of fact might, in the opinion of the counsel for the United States, be drawn from those facts, ought to have been averred as facts; and, without such averment, those inferences cannot be taken into consideration by the Court, for the same reason which would exclude them in the case of a special verdict.

In the present indictment, those inferences are drawn and averred as facts. It is averred "that the said letter thus written, and dated, and addressed, and sent from the said Treasury Department, and the office of the Fourth Auditor thereof, purported to be, and was fraudulently intended by the said Watkins, to appear as an official letter of said Watkins; and was so written, dated, addressed, and sent to deceive the said Paulding, by such appearance, and to induce him to pay the draft aforesaid out of the moneys of the United States in his hands; and the said Paulding was so deceived, and did, in consequence of such deceit, so pay the same out of the said moneys of the United States in his hands."

It is also averred that the said letter was fraudulently in-

tended, by the said Watkins, to appear, and did appear as an official letter of the said Watkins; and, as representing that the sum of money therein mentioned was to be paid for the public service of the United States, and that the draft therein mentioned was drawn on account of the public service of the United States, and to deceive the said Paulding by such appearance, and to induce him to pay the same out of the moneys of the United States in his hands; and that the said Paulding was so deceived, and paid the same out of the said moneys of the United States in his hands.

The indictment then avers that the public service of the United States did not require the payment of the said sum of money in the letter and draft mentioned; and that the defendant well knew that the same was not so required. That he had no authority, and well knew he had no authority to draw the money, or to write the said letter of advice, on account of the public service of the United States, as an official letter; and avers that he wrote the letter and made the draft, ostensibly for the public service, but falsely and fraudulently, for his own use and benefit, and to deceive the said Paulding, and to defraud the United States; and that, by means of the said letter, so written, dated, addressed, and sent as aforesaid, he did unlawfully, fraudulently, and deceitfully obtain, to and for his own use and benefit, the said sum of \$300 of the moneys of the United States, from and out of the hands of the said Paulding, Navy Agent, as aforesaid; to the great deceit, fraud, and damage of the United States, and against the peace and government thereof.

These averments, we think, supply the defects which, according to the former opinion of the Court, rendered the former indictment, upon the same transaction, insufficient; and, consequently, we think the present indictment sufficient.

The third indictment is upon a transaction with Mr. Harris, the Navy Agent at Boston.

The first count, after the stating that the defendant was Fourth Auditor, &c.; that Mr. Harris was Navy Agent; that Mr. Southard was Secretary of the Navy; that there was an appropriation, by law, of \$20,000, for arrearages prior to 1827; that the Secretary of the Navy had signed certain blank requisitions, which he left with Mr. Hay, Chief Clerk of the Navy Department, to be filled up, in the absence of the Secretary, with such sum or sums of money, and payable to such person or persons, as the public service, in relation to the Navy Department, might require; that the Secretary of the Navy was absent from Washington, on the 27th of August, 1827, and continued

absent until after the 6th of September in that year; charges,— That the defendant, being Fourth Auditor, as aforesaid, and well knowing the premises, and devising and intending fraudulently and unjustly to acquire to himself, and for his own private use, the money of the United States, with force and arms, on the 27th of August, 1827, at the county of Washington aforesaid, falsely, fraudulently, and deceitfully pretending that the sum of \$2,000 was wanted for the service of the Navy of the United States, for payment of arrearages prior to 1827, did then and there write and address to the Secretary of the Navy the following letter:

“Fourth Auditor’s Office, 27th August, 1827. Sir — I will thank you to cause to be sent to Richard D. Harris, Navy Agent at Boston, two thousand dollars, under the head of arrearages prior to 1827. I am, Sir, respectfully, your obedient servant, T. Watkins. Hon. Secretary of the Navy.”

Which letter was addressed to Mr. Hay, the Chief Clerk; and by means of said pretence and letter, the defendant procured one of the blank requisitions to be filled up for \$2,000, payable to the said Richard D. Harris, &c.; which sum was, in conformity with the said requisition, by warrant from the Secretary of the Treasury, drawn out of the Treasury of the United States, and placed in the hands of the said Richard D. Harris, the Navy Agent, as aforesaid, with intent to defraud the United States of the said sum of money.” And, after denying the truth of the pretences, it concludes with this averment — “But then and there intended to defraud the United States of the same, and to convert the same to his own proper use and benefit, and did thereby defraud the said United States of the said sum of money, and did apply and appropriate the same to his own proper use, to the great damage of the United States,” &c.

This count, in the opinion of the Court, is clearly insufficient; because it does not aver the means by which the United States lost the money, or suffered any damage by the placing of the money in the hands of the Navy Agent, or were defrauded.

The second count is not liable to this objection, as it sets out all the drafts by which the money was drawn out of the hands of Mr. Harris; and has all the other requisites which were deemed by the Court sufficient to sustain the indictment upon the case for \$750, in the transaction with Mr. Paulding.

The motion for a new trial is made upon the ground that the verdicts were against evidence; because, as it is said, there was no evidence of the pretence to Mr. Southard, in regard to the requisition for the \$750, nor to Mr. Hay, in relation to the requisition for the \$2,000.

Hade v. Brotherton.

But the COURT is of opinion that the deposition of Mr. Cottringer, and the letter of the 27th of August, 1827, contain evidence from which the jury might infer such a pretence in each case.

It was also said, that there was no evidence that Mr. Hay was Chief Clerk; but that fact was not controverted at the trial, and was argued upon by the counsel as a fact admitted, and not contradicted at the trial.

Upon the whole, therefore, the Court is of opinion that the judgment ought not to be arrested, nor a new trial granted in either of these cases.

Whereupon, after a pause,

Mr. Swann, the District Attorney, observed that it was his duty to request the judgment of the Court.

Mr. Coxe, for the defendant, stated that he had nothing further to say.

The defendant was then brought into Court, and sentenced.

In the case for \$750, that he pay a fine of \$750, and be imprisoned three calendar months from this 14th of August, 1829, inclusive.

In the case for \$300, that he pay a fine of \$300, and be imprisoned three calendar months next after the termination of his imprisonment upon the former sentence. And,

In the case for \$2,000, that he pay a fine of \$2,000, and be imprisoned three calendar months next after the termination of the last preceding sentence; making, in the whole a fine of \$3,050, and nine months' imprisonment.

CARRICO v. KIRBY'S EXECUTOR.

Upon an issue, from the Orphans' Court, *devisavit vel non*, the party contesting the will has the right to open and close the argument to the jury.

THIS point was so ruled by the COURT, (*nem. con.*) on the authority of *Dunlop v. Peter*, in this Court, at _____ term, not reported.

Verdict in support of the will.

HADE v. BROTHERTON.

Upon the plea of *nul tiel record*, a transcript of the record of a justice of the peace in Pennsylvania, certified by him to the county court, and certified by the prothonotary

Kennedy v. The Corporation of Washington.

and the presiding judge of that court, according to the Act of Congress, is evidence of the judgment, although that transcript consists of short docket-entries.

DEBT, upon the judgment of a justice of the peace in Pennsylvania, entered of record in the Court of Common Pleas of county, in Pennsylvania.

The record of the Court of Common Pleas was certified by the prothonotary and the presiding judge, according to the Act of Congress; and it stated a transcript of a judgment rendered by a justice of the peace, for \$78.62½, and 37½ cents costs, certified to the court by the justice of the peace.

That transcript consisted of short docket-entries only, stating a summons, and judgment by default, upon a note and open account.

Mr. Marbury and *Mr. Turner*, for the defendant, contended that it was no record of a judicial proceeding. It contained no declaration, no plea, and no issue.

Mr. Hall, for the plaintiff.

The COURT (*MORSELL, J., contra*.) was of opinion, upon the plea of *nul tiel record*, that it was such a record as is stated in the declaration.

MORSELL, J., thought it could not be considered as a record, because not made out in full form of a technical record.

F. X. KENNEDY v. THE CORPORATION OF WASHINGTON.

A *mandamus* will not lie to the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington, to compel them "to make such regulations as they may deem proper, prescribing the manner of erecting private wharves within the limits of the city of Washington."

Mr. Coxe, in behalf of F. X. Kennedy, moved the Court for a rule on the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington, to show cause why a writ of *mandamus* should not issue to them, commanding them to make such regulations as they might deem proper, prescribing the manner of erecting private wharves within the limits of the city of Washington.

This motion was supported by the affidavit of F. X. Kennedy, that he was the purchaser of lot No. 1, in the square No. 329, in that city; that he had applied to the corporate authorities of the city, for leave to build a wharf on that lot; and also for the direction of such commissioners as, by the by-laws of the corporation, the mayor is authorized to appoint, in regard to the plan

and construction of the said wharf, which they have refused to give.

By the Maryland Act of 1791, c. 45, § 13, it is enacted, "That the commissioners aforesaid," (of the city of Washington, appointed under the Act of Congress of the 16th of July, 1790, § 2,) [1 Stat. at Large, 130,] "for the time being, or any two of them, shall, from time to time, until the Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of the Potomac, and the Eastern Branch, adjoining the said city, of the materials, in the manner, and of the extent they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters, without license, as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance."

By the charter of the city of Washington, of the 15th of May, 1820, § 7, the corporation has power, among other things, "to preserve the navigation of the Potomac and Anacostia rivers, adjoining the city; to erect, repair, and regulate public wharves, and to deepen creeks, docks, and basins;" and "to regulate the manner of erecting, and the rates of wharfage at private wharves."

Mr. Wallach, for the corporation, contended that the power given to the corporation was a power to be exercised or not at its discretion, and according to its discretion; in which case it has been decided that a *mandamus* will not lie. 2 Esp. N. P. 668.

Mr. Coxe, contra. The only discretion which the corporation has is how to do it, not whether they shall do it or not. It is their duty to regulate the manner in which the wharves shall be built. The proprietors cannot enjoy their rights until that is done; and although this Court will not command them how they shall legislate upon the subject, yet it may compel them to legislate upon it. 5 Com. Dig. 31, Police; *Rex v. St. Margaret's Parish*, 4 M. & S. 250; 1 T. R. 146. The right of wharfing is not settled by the common law, but is always a matter of police.

Mr. Jones, for the corporation, in reply, referred to the opinion of N. King, (Burch's Digest, 351, 359, &c.) that it appertains to the courts of the several States, and of the United States, to determine upon these rights. The power of the commissioners, upon this subject, ceased to exist by its own limitation, by the assumption of jurisdiction by Congress on the 27th of February, 1801, [2 Stat. at Large, 103]; and the power given to the corporation, in relation to private wharves, is only to regulate the man-

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ner of erecting them, not to limit the extent of them, or to interfere with the rights of the owners of the land adjoining the river.

But if they have the power under the charter, it is a power to be exercised by them or not, at their discretion. The corporation is a local legislature; and within the sphere of their legislative jurisdiction are as independent as any other legislature; but they cannot affect original rights derived from the original proprietors.

The COURT refused to issue the *mandamus*, for the reasons stated in the argument of *Mr. Jones* and *Mr. Wallach*.

 NEGRO HARRY WIGLE *et al.* v. J. B. KIRBY'S EXECUTOR.

Slaves cannot be manumitted in Washington County, D. C., by last will, if over forty-five years old at the time the manumission is to take effect.

PETITION FOR FREEDOM. The petitioners claimed freedom under the will of John Baptist Kirby, by which they were to be free at his death. Some of them were over forty-five years of age at the death of the testator.

Mr. Ashton, for the defendant, prayed the Court to instruct the jury that if any of the petitioners were over the age of forty-five at the testator's death, the manumission was void as to them; and cited *Burrough v. Negro Anna*, 4 Harr. & Johns. and *Hamilton v. Cragg*, 6 Har. & Johns. 16.

Mr. Coxe, contra. There were formerly, in Maryland, different opinions in regard to this question, but the Court of Appeals of Maryland have decided it since the formation of this district. While the law was unsettled in Maryland, this Court decided that the manumission was valid if provision was made by the testator against the slaves being a burden upon the public.

Previous to the Act of 1752, c. 1, manumission by will was lawful; otherwise that act would have been unnecessary, (see its preamble,) and the second section does not make void the manumission, but only subjects the party to a penalty, and obliges him to support the negro during his life, "whereby he may not become a burden to others, or perish through want, to the great scandal of christian society." The object of the thirteenth section of the Act of 1796, c. 67, is the same as that of the second section of the Act of 1752, which is repealed by the twelfth section of the Act of 1796. The interpretation should be in favor of liberty. "And," in the thirteenth section, should be construed to be "or," so as to read thus, "unless the said

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slave or slaves shall be under the age of forty-five years," or able to work and gain a sufficient maintenance and livelihood." This testator has made sufficient provision for the maintenance of the old and infirm, as well as of the young.

Mr. Ashton, in reply. The legislature of 1796 intended to fix the rule of age as the qualification for manumission, in order to avoid disputes as to the ability of the slave to maintain himself, if over that age. It is a clear and definite line drawn; and although under forty-five, the negro must still be able to maintain himself.

The Court stopped *Mr. Ashton*, and said that the law of 1796 was positive and clear, and that the decisions of the Court of Appeals of Maryland upon their own law are to be respected by this Court.

The COURT (*nem. con.*) gave the instruction as prayed by *Mr. Ashton*.

Verdict and judgment accordingly.



THE CHESAPEAKE AND OHIO CANAL COMPANY v. NATH'L. P. POOR.

The instalments due by the subscribers to the Chesapeake and Ohio Canal Company, may be recovered on motion, with costs.

THIS was a motion for judgment against a stockholder, for instalments due upon the shares subscribed for by him in the stock of the Chesapeake and Ohio Canal Company; ten days notice of the motion having been given, according to the fifth section of the charter granted by Virginia, and confirmed by the States of Maryland and Pennsylvania, and by the United States; by which it is enacted that "whenever any subscriber shall fail to pay any instalment called for by the Company, it shall and may be lawful for the Company, upon motion to be made in any court of record, after ten days notice, to obtain judgment against the subscriber so failing to pay." The charter says nothing respecting the costs of the motion.

Mr. Wallach, for the plaintiff, observed that the statute of Gloucester gives costs wherever damages could be recovered at common law, although a summary remedy may be given by statute. *Hulloch on Costs*, 5. If these subscriptions had been sued for at common law, upon the contract, damages would have been given.

The COURT (*nem con.*) ordered the judgment to be entered for the several subscriptions, with costs; and observed, that the

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charter was granted by Virginia, and confirmed and adopted by Maryland, Pennsylvania, and the United States; and that there was in Virginia, at that time, a statute authorizing the court in all cases of judgment on motion to give costs at its discretion. If such a motion as the present were made in Virginia against a subscriber under this charter, the judgment would be with costs, and the same construction should be given everywhere to this clause of the charter.

Judgment for \$75, with costs.

THE CHESAPEAKE AND OHIO CANAL COMPANY v. F. S. KEY.

To condemn the land of an individual for the use of the Chesapeake and Ohio Canal Company, is to take private property for public use.

The damages assessed by the jury must be considered as the just compensation required by the amendment of the Constitution, which forbids the taking of private property for public use without just compensation. That compensation must be just towards the public, as well as just towards the individual whose property is taken.

The charter granted by Virginia having been ratified and confirmed by Congress, became as much an act of Congress, so far as it is applicable to the District of Columbia, as if it had been reenacted with such modifications as might be necessary to fit it for use in the District.

The power to take private property for public use, upon just compensation, is not a power in derogation of common right. All property is held subject to that power; and the right thus to take private property for public use, is as much common right as that of the individual. The canal is a great highway; and all lands are held subject to the right of the public to make a highway through them.

The charter should be so construed as to carry into effect the will of the legislature. The words "from" and "at" do not always exclude the place to which they refer.

The beginning of the eastern section of the canal is not precisely fixed by the charter, but is left to the discretion of the Company, with this limitation only, that it should be in the District of Columbia, and upon tide water.

A certain day must be fixed, in the warrant, for the meeting of the jury on the land, and the want thereof is fatal to the inquisition.

THIS was a motion by *Mr. F. S. Key*, to set aside an inquisition which had been taken and returned to the Court, condemning, for the use of the canal, a lot in Georgetown, owned by him.

The cause was argued by him and *Mr. Jones*, on the 23d and 25th of May, 1829.

The statement of the case will appear in the opinion of the Court, which on the 20th of July, was delivered by

CRANCH, C. J. This cause comes before the Court by a motion to set aside the inquisition which condemns *Mr. Key's* land in Georgetown, for the purposes of the canal, under the 15th section of the charter granted by Virginia, and confirmed

by Maryland, Pennsylvania, and the United States. By that section it is enacted that the inquisition taken and returned in the manner therein set forth, shall be affirmed, unless good cause be shown against it.

Mr. Key, in showing cause, has taken the following objections to the inquisition, and to the proceedings upon which it was founded.

1st. That the provisions of the charter for condemning land, are unconstitutional, because no provision is made for just compensation.

2d. That the act of Virginia, granting the charter, is not in force in this district, because that act is only confirmed, not reenacted by Congress.

3d. That the Company has no right to condemn land in Georgetown.

4th. That the warrant is insufficient in form and substance.

5th. That some of the jurors were interested.

6th. That the Marshal has only certified that the fourteen jurors who were sworn were not interested; and not that the whole eighteen who were summoned, were not interested.

7th. That the oath was not properly administered; and was not administered upon the land.

8th. That the inquisition does not cure the defect of the marshal's return, nor the faults of the warrant.

1. That the company has no right to condemn land, because that clause of the charter, so far as it attempts to authorize such condemnation is unconstitutional, inasmuch as it does not provide a just compensation to the party whose land is sought to be condemned.

The words of the 5th Amendment of the Constitution of the United States, upon which this objection is founded, are these, "Nor shall private property be taken for public use without just compensation."

This amendment admits the principle that private property may be taken for public use, if just compensation be made. It is not denied that to take land for the use of the canal, is to take it for public use.

The question, then, is, whether the charter provides for making a just compensation.

It is said that it does not, because it directs that, "in every such valuation and assessment of damages, the jury shall be, and they are hereby instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the canal through, or erecting any of the said works upon his land, and to regulate their verdict

thereby; except that no assessment shall require any such owner to pay or contribute any thing to the said company, where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as "aforesaid."

It is contended, that the Constitution provides a positive, not a conjectural compensation; that under the provisions of this charter, it may happen that no compensation at all may be made; that the expected benefits which the jury shall have estimated, may never arrive; and that, therefore, the jury should not have been required, by the charter, to consider them in their estimate of value and damages.

But the Constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take the private property for public use. All the States, prior to the adoption of the Constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads, and other public uses; and they have generally provided for compensation through the intervention of a jury.

It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just compensation. If the jury had not been required by the charter to consider the benefit as well as the damage, they would still have been at liberty to do so, for the Constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation, to give him the full value. If the jury would have a right to consider the benefit as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter, it might happen that no compensation at all, or, at most, a nominal compensation, would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public, as well as just towards the individual, they ought to do, cannot be considered as repugnant to the Constitution.

2. But it is objected, 2dly, That the Canal Company has no right to condemn land within the District of Columbia; because

Virginia had no right to legislate for that district, or in regard to lands therein. It is said that the Act of Congress only ratifies and confirms, but does not reënact the act of the State of Virginia, and that even that ratification is limited; that the act of Virginia is only ratified and confirmed so far as it may be necessary to enable the company to carry into effect the provisions thereof in the District of Columbia; and that "the provisions thereof," are not applicable to the state of things in that district, where there is no sheriff, no county clerk, and no prothonotary. This is understood to be the substance of the objection.

For the purpose of considering this objection, I shall take it for granted that, by the charter, it is contemplated that some part, at least, of the canal, or its works, will be in the District of Columbia.

It is evident, from a perusal of the charter granted by Virginia, that the legislature intended that it should be coextensive with the whole object in view, and should confer all the powers necessary to accomplish it. It professes to legislate as well over the District of Columbia and the State of Maryland, as over Virginia; but it restrains itself until the consent of Congress and Maryland should be obtained. That consent only was wanting to give validity to its legislation; and it is expressly provided that the charter shall be so construed as to fit it for use in Maryland and in the District of Columbia. This charter, therefore, having been ratified and confirmed by Maryland and by Congress, in the manner required by the legislature of Virginia, has become as much an act of Congress, so far as respects this district, as if it had been expressly reënacted with such modifications as might be necessary to fit it for use in the district.

In order to show that it was the intention of the legislature of Virginia, to legislate in regard to such part of the canal as should be within the District of Columbia, it is only necessary to read the provisions of the charter.

In the first section, they expressly require the assent of the legislatures of Maryland, Pennsylvania, and the United States, before any of its provisions should take effect.

By the 14th section they require the assent of the same States, and of the United States, to any alteration of the tolls for the use of the canal; that is, (according to the proposition before assumed,) a canal extending into the district.

In the 15th section it is said to be necessary "for making the said canal," that provision should be made for condemning a quantity of land for that purpose; and it provides for the condemnation of any land "through which the said canal is intended

to pass." These provisions show that the power to condemn land, was intended to be coextensive with the canal itself.

And the 22d section provides that so much of the charter "as respects the canal and works designed to be constructed in the District of Columbia, and the States of Virginia and Maryland, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application and use upon the assent of the Congress of the United States, and the legislature of Maryland being given thereto."

All that is necessary to fit the provisions of the charter for use in the District of Columbia, so far as it regards the condemnation of land, is, so to modify it by construction, as to substitute the marshal of the district for the sheriff of the county; the clerk of the circuit court for this county, for the clerk of the county, and the circuit court, sitting in the county, for the county court, which seems to be alluded to in the charter.

Such a modification in the construction of the charter is required by the charter itself; and, being confirmed by Congress, is equivalent to an express provision by Congress to that effect.

The right, therefore, and the means, to condemn land in the District of Columbia, are given to the company, provided the charter intended to give, and purports to give the company a right to construct any part of the canal, or of its works in that district.

The third objection is, that the company has no authority to condemn land in Georgetown.

Upon this point it has been contended, that the authority to condemn land for public use, without the consent of the owner, is in derogation of common right; and, therefore, the charter must be construed strictly. That none of the expressions in the charter indicate clearly a right in the company to extend the canal below the highest convenient and safe navigable tide-water of the Potomac. Thus the words in the preamble, "from the tide-water of the River Potomac, in the District of Columbia," are perfectly satisfied by commencing the canal at the highest part of the tide-water of the River Potomac, in the district; and the fourth section, which gives the company its authority to make the canal, only gives them power to make a canal from the tide-water of the Potomac, in the said district. The word "from," it is said, is exclusive of the point, or place, named; and, of course, the canal must strictly, according to the terms of the charter, begin at the highest point of tide-water in the district. But it is admitted that this strictness must have a reasonable construction; and that it must mean the highest point of safe and convenient navigable tide-water.

So in the twentieth section of the charter, which describes and defines the eastern and western sections of the canal, the words are — “That the first, or eastern section of the canal, shall begin at the District of Columbia, on tide-water, and terminate at or near the bank of Savage River;” “that the second, or western section, shall commence at the said termination,” &c., “to the highest steamboat navigation of the Ohio River.”

Here the word “at” is also supposed to be exclusive of the place named. A person, it is said, may be *at* a place, and not *in* it; and the word is evidently used in that sense in the subsequent clause of the same sentence, where it is said that the second section shall commence *at* the termination of the first. Here it is impossible that “at” should mean “in.” Then, in the strict construction which ought to be given to this charter, it is said that, if the tide-water of the Potomac extends as high as the upper line of the District of Columbia, the canal must stop at that line. But here, also, it is admitted, that this strict requisition of the charter must be relaxed, by the application of a reasonable construction; introducing a proviso that the tide-water, where the upper line of the district crosses the river, should be safely and conveniently navigable; and that, if it should not be so, the canal may be continued into the district until it shall meet such navigable water, but no further.

The only words in the charter which describe or define the lower *terminus* of the canal, are those which have been cited from the preamble, and from the twentieth section. The strict construction of those words, thus contended for, it is said, is corroborated by the terms of the charter of the old Potomac Company, and its practice under that charter; by the memorials of the Committee of the Canal Convention to the Legislatures of Maryland and Virginia, in 1823; and of the Central Committee to Congress, in April, 1826; by the Report of General Bernard, the chief executive officer of the Engineer Department; and by the Common Council of the city of Washington, in their Resolution of the 5th of July, 1827, for calling a meeting of the inhabitants to consider the subject of the canal.

Whether it will be necessary or proper for the Court to resort to such extraneous evidence of the meaning of the charter, will depend upon the question, whether, after applying the proper rule of construction to the words of the charter itself, they shall remain obscure or ambiguous, in relation to the point in dispute?

The first question, then, is, what is the proper rule of construction applicable to charters, and such legislative acts as are in

the nature of charters? Is it that the words shall have the strongest possible construction against the grantee? Or is it that they shall have a reasonable construction, drawn from the whole context of the instrument, or act, to carry into effect the intention of the parties? Here it is said that the strictest construction ought to be adopted against the powers granted to the company, because those powers are in derogation of common right. But is that true? Is the right to take private property for public use, upon making just compensation, in derogation of common right? The right of the public has been recognized by the Constitution of the United States, and has, from time immemorial, been exercised by the several States ever since the Revolution; and was, before that period, exercised by the Colonies, and by the mother country. It is one of the conditions upon which all property is holden by individuals; and, as a member of the public, the individual himself is as much interested in maintaining it, as he is in maintaining his individual rights.

The public right is as much common right as the individual right. This public right is not a power exercised merely because the sovereign power cannot be controlled, and therefore in derogation of common right; but it is a constitutional power, primarily assented to by the people themselves, in their original primitive sovereignty, not applicable to any particular individual, but extending equally to all, and creating a lien upon all property, into whose hands soever it may come. The contemplated canal is intended to be a great highway; and no man can be ignorant that he holds his lands always subject to the right of the public to make a highway through it, whenever the great interests of the nation or of the State may require it.

It does not seem to me, therefore, that the power given by this charter, to condemn land for this highway, is such a power in derogation of common right as will justify the Court in confining the words "at" and "from" to their strictest and strongest sense, against the company.

Nor would I, on the other hand, entirely adopt the rule applicable to grants, — that the words shall be taken most strongly against the grantor; but the rule most properly applicable seems to be that which is applied to wills, and to ordinary legislative acts; to wit, to give that construction which will best carry into effect the will of the testator or of the legislature.

The question then occurs, what was the will of the legislature of Virginia, in regard to the lower *terminus* of the canal? Did they mean to fix the precise spot at which the water of the canal should be mingled with the tide-water of the Potomac?

Or did they mean to leave it to the discretion of the company, under any and what limits?

The word "from" is not always, and, indeed, in common conversation is seldom exclusive of the place named. Thus, if I should say I had just come from Philadelphia, no one would suppose that I spoke the truth if I had never been *in* Philadelphia; and, if I had sworn to the fact, I could hardly be saved from the penalty of perjury, by proving that I came from the utmost boundary of the city, without having been either within or upon the boundary. "From" a town, or district, generally means from some indefinite place within that town, or district; and the expression is justified, if the person came from any part of the town or district.

So the word "at," in ordinary speech, more generally means *within* than *without*. Thus, *at* a town, or *at* a county, means at some place *within* the town, or *within* the county, rather than a place without, or even at the utmost verge of, but not *in* the town or county.

So in indictments, where the utmost legal precision is necessary, the fact is generally stated to have been done *at* the place; and, if it were not done *in* the place, the *venue* would be wrong. And in indictments in this district, where we have no hamlets or parishes, the act is generally averred to have been committed *at* the county; and if that did not mean *within* the county, the Court would have no jurisdiction of the cause.

The words "from" and "at," therefore, have not, in general, an exclusive signification; nor are they, in the charter, connected with any other words which render it necessary that they should be so construed. The words in the preamble are — "A navigable canal from the tide-water of the river Potomac, in the District of Columbia." This description would be fully justified by a canal from any part of the tide-water of the River Potomac, in that district. In the twentieth section, the words are — "The first, or eastern section, shall begin at the District of Columbia, on tide-water." This description, also, would be justified by a canal beginning in any part of the district, upon tide-water. There is no expression in the charter inconsistent with such a construction. On the contrary, there are several provisions which strongly corroborate it.

The first enacting clause of the charter, by Virginia, of the 27th of January, 1824, requires the assent of the Congress of the United States to the provisions of that act; and, by the twenty-third section it is declared, that such assent is understood and taken to relate only to their authority as the legislature of the District of Columbia. But if the words "from" and "at" are

to have this exclusive signification, no part of the canal could be within the district, and the assent of Congress, as the local legislature of the district, would be wholly unnecessary.

So in that case, the assent of Congress, which is required by the fourteenth section to an alteration of the rates of toll, would be entirely useless.

So in the twenty-first section, a right is given to the United States to retain the power to extend the canal *in* (not *into*) the District of Columbia, on either side, or both sides, of the River Potomac; and the same section provides, that "the United States shall authorize the States of Virginia and Maryland, or either of them, to take and continue a canal from any point of the above-named canal, or the termination thereof, through the territory of the District of Columbia." And by the twenty-second section it is enacted, "that this act, or so much thereof as respects the canal and works designed to be constructed in the District of Columbia, and States of Virginia and Maryland, shall take effect, with such necessary modification in the construction thereof, as shall fit it for such limited application or use, upon the assent of the Congress of the United States and the legislature of Maryland being given thereto; and, upon its receiving the further assent of the legislature of Pennsylvania, the whole, and every section and part thereof shall be valid, and in full force and operation."

So, also, the confirming Act of Maryland, of the 31st of January, 1825, says — "And for the purpose of removing all doubts as to the right of the State of Maryland to intersect the said Chesapeake and Ohio Canal, for the purpose of constructing a lateral canal, or canals, to Baltimore, or elsewhere, in the State of Maryland, from that part of the said Chesapeake and Ohio Canal which shall be within the District of Columbia, be it further enacted," &c.; thereby clearly showing the understanding of the legislature of Maryland, in the very act of confirming the charter, that a part of the Chesapeake and Ohio Canal would be constructed within this district.

So also the Act of Congress of the 3d of March, 1825, [4 Stat. at Large, 101,] confirming the charter, enacts, "that the act of the legislature of Virginia, entitled an act incorporating the Chesapeake and Ohio Canal Company, be and the same is hereby ratified and confirmed, so far as may be necessary for the purpose of enabling any company that may hereafter be formed by authority of said act of incorporation, to carry into effect the provisions thereof, in the District of Columbia, within the exclusive jurisdiction of the United States, and no further."

So also the second section of the same act speaks of the right

of Virginia and Maryland, "to take and continue a canal from any point of the Chesapeake and Ohio Canal, to any other point within the territory of the District of Columbia," showing clearly the understanding of Congress that a part of the canal would be made in the district.

Again, by the fourteenth section of the charter, the old Potomac company is authorized to transfer, and the new company to accept, all the property, rights, and privileges of the Potomac Company, which has been done, and among that property are locks below the little falls, which are within the district, and which are to be kept in repair by the new company until the new works shall be substituted for them.

So, also, it is enacted by the second section of the Act of Congress of the 23d of May, 1828, [4 Stat. at Large, 293,] that the authority designed by the former act of Congress, confirming the charter to be given to the States of Virginia and Maryland, "to extend a branch from the said canal, or to prolong the same from the termination thereof, by a continuous canal within or through the District of Columbia towards the territories of either of those States, shall be taken to be as full and complete in all respects as the authority granted by that act to the Chesapeake and Ohio Canal Company to extend the main stem of the said canal within the said district."

So, also, by the Act of Congress of the 24th of May, 1828, [4 Stat. at Large, 293,] it is enacted, "that, for the supply of water to such other canals as the State of Maryland, or Virginia, or the Congress of the United States may authorize to be constructed in connection with the Chesapeake and Ohio Canal, the section of the said canal leading from the head of the little falls of the Potomac River, to the proposed basin next above Georgetown, in the District of Columbia, shall have the elevation above the tide of the river at the head of the said falls, and shall preserve throughout the whole section aforesaid a breadth at the surface of the water of not less than sixty feet, and of depth, below the same, of not less than five feet, with a suitable breadth at bottom."

Nothing can be more clear than that the legislatures of Virginia, Maryland, and the United States, expected that some part of the canal and works would be constructed within the District of Columbia; and, consequently, that they did not mean to use the words "from" and "at" in their exclusive sense. If those words are not to be confined to their exclusive sense, they must be taken in their ordinary sense; and, taken in their ordinary sense, they authorize the company to commence the canal on any part of the tide water in the District of Columbia.

Who, then, is to determine the precise spot where it shall commence? Surely it must be the company, for they only have a right to make the canal; and they are bound to make it in a certain time, under the penalty of a forfeiture of their charter. They must, therefore, act upon the subject; and who shall control their discretion, if they exercise it honestly?

It is said, that the object of the charter was to make the river navigable where it was not navigable before; and as it was before navigable a mile or two above Georgetown, the meaning of the legislature was, that they should commence the canal a mile or two above that town. But the legislature has not said so. The only limit they have imposed to the discretion of the company is, that they should begin their canal on the tide water in the District of Columbia. Besides, if that idea were to limit their powers, they would have to let their canal down into the Potomac at every point where it is already navigable.

And again, it is not probable, that when the legislature was contemplating the great object of a national highway from the eastern to the western part of this continent, they would have occupied themselves with an examination of all the minute and local circumstances which must be taken into view to determine the precise spot where it would be best for all concerned that the canal should commence. But it is sufficient to say that they have not determined it, and we can easily imagine many good reasons why they have not.

It has also been suggested that this company is only a substitute for the old Potomac company; that the object is the same, and that all the property, rights, privileges, and powers of the old company are transferred to the new; and, therefore, that the new company cannot extend the canal further down into the district than the works of the old company extended. But the old company was obliged, by its charter, "to make at or near the little falls, such canal and locks, if necessary, as will be sufficient and proper to let vessels and rafts aforesaid into tide water." But no such limitation is contained in the new charter, nor are the powers of the new charter at all limited by reference to those of the old. Whatever analogy there may be between the object and powers of the old company and those of the new, it does not affect the plain and clear provisions of the latter.

Not perceiving any ambiguity or uncertainty in the provisions of the present charter, in regard to the place of commencement of the canal; and being of opinion, that the fixing the precise point of commencement is left to the discretion of the company, within the limits fixed by the charter, it is unnecessary to exa-

mine the extraneous matter which has been offered in evidence, such as the memorials of the Committee of the Canal Convention, &c., for whatever looseness or uncertainty there might be in papers of that kind, where the precise point of beginning was not the object of those memorials, the terms seem to be sufficiently settled by the charter itself.

The company, therefore, having the right to determine the precise place of commencing the eastern section of the canal, within the limits prescribed to them by their charter, and having so determined it, have a right to obtain, by agreement or condemnation, all the land that may be "necessary for the making of the said canal, dams, locks," &c. ; and the only remaining question is, whether the proceedings, in obtaining the condemnation of the land mentioned in this inquisition, are correct, and can be sustained.

The first objection taken to them is, that the warrant is insufficient.

1st. Because it is general, embracing land belonging to divers persons having no connection with each other; whereas there ought to have been a separate warrant for each person's land.

2d. Because the warrant does not state a disagreement between the company and the defendant (Mr. Key,) before the issuing the warrant, so as to justify the company in requiring a warrant against his land, or to authorize the justice of the peace to grant it; nor does it state that Mr. Key was under age, or *non compos*, or out of the State or county.

3d. Because the warrant does not, with sufficient certainty, describe the land to be condemned.

4th. Because it does not name the owners.

5th. Because no definite certain day was expressed in the warrant for the jury to meet on the land.

Being of opinion that the fifth objection to this warrant, namely, that it does not express a certain day for the jury to meet on the land, is fatal to this inquisition; and it being very important to all the parties concerned that the opinion of the Court should be known upon the other important points in the cause which it has considered; and as the other objections taken to the proceedings involve many new and nice questions, which it will take more time to decide correctly than the Court can, during the short intervals between their daily sessions, bestow upon them, the Court deems it to be its duty to deliver its opinion now, upon the points which it can decide; and to decline giving any opinion upon the other points at present.

The fifteenth section of the charter requires that a day should be expressed in the warrant, for the meeting of the jury upon the land.

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This warrant commanded the marshal to summon a jury "to meet on the said quantity of land, and lands adjacent thereto respectively, on Thursday, Friday, and Saturday, Monday, Tuesday, Wednesday, Thursday, and Friday, the ninth, tenth, and eleventh, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth days of April next, or so many days thereof as may be necessary to complete the said inquisition. Who was to say which of those days would be necessary? It is evident that no certain day is fixed by the warrant, and for that reason it is the opinion of the Court that this inquisition must, in the language of the charter, be "set aside," with costs.

MEMORANDUM. The other two judges, feeling interested in the questions involved in this cause, sat only to make a Court, and declined giving any opinion; so that the foregoing opinion is, in truth, that of the Chief Justice only.

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NEGRO THOMAS BUTLER *et al.* v. GABRIEL DUVAL.

The object of the 21st section of the Maryland Act of 1796, c. 67, which enacts that petitions for freedom shall be commenced and tried only in the county where the petitioner shall reside, under the direction of his master, seems to have been to prevent the filing of such petitions in the General Court, and to confine the original jurisdiction, in such cases, to the county courts; not to the county in which the master resides, but to the county in which the petitioner resides, under the direction of his master. It seems that this section is applicable only to persons claimed as slaves by residents of Maryland.

So far as the object of this section is to designate which of the county courts of Maryland should have jurisdiction, it is not applicable to this county, as there is only one county in the District to which the laws of Maryland can be applied; the whole of the territory ceded by Maryland to the United States being contained in the county of Washington.

The right to petition for freedom is not for the first time given by that statute. It existed long before, and was in daily use at the time of passing the Act of 1796.

A petition for freedom is not a local action. The right is personal, and accompanies the person wherever he goes.

The remedy is not confined to the courts of Maryland; nor is it necessary that the right to freedom should have accrued under the law of Maryland, nor in the county of Washington.

A petition for freedom is an action *quasi in forma pauperis*; and the Court ought to see that the petitioner is not entrapped in the subtleties of special pleading; and for that purpose will permit repeated amendments, especially after the other party has amended his pleadings.

THE petition for freedom, in this case, stated that the petitioners, Thomas Butler, his wife Matilda, their three children, Airey, Reason, and Sally, and their two grandchildren, Lydia and Eliza, were entitled to their freedom, but were held in a state of slavery by the defendant, Gabriel Duvall, contrary to

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law, and that they were about to be sold out of this District to foreign purchasers.

Mr. Duvall, in proper person, pleaded to the jurisdiction of this Court as follows: And the said Gabriel Duvall, in his proper person, comes and says that the Circuit Court of the District of Columbia, here, ought not, as he humbly conceives, to have cognizance of the petition aforesaid, because he says, that ever since the first institution of the said court, here, by the statute in such case provided, and passed by the legislature of the State of Maryland, at the November session, 1796, of the General Assembly of the said State, and ever since the said session remaining unrepealed and in full force and operation within the said State, and ever since the 27th day of February, 1801, adopted, and in full force and operation within the county of Washington aforesaid, by force of the act of Congress in such case provided, no petition for freedom can be commenced or tried in any place or jurisdiction, but in the county where the petitioner or petitioners bringing such petition, shall, at the time of bringing such petition, reside, under the direction of his, her, or their master, mistress, or owner; that the said Gabriel Duvall, at the time of the commencement of the said petition, always before, and ever since was, and yet is, a citizen of the said State of Maryland, and actually settled and resident in the county of Prince George's in the said State, and not in the county of Washington aforesaid, or elsewhere in the District of Columbia aforesaid; and that during all the time and times aforesaid, the said petitioners, and each and every of them, did and yet do and does reside in the said county of Prince George's and State aforesaid, under the direction of the said Gabriel Duvall, then and during all the time and times aforesaid, being the master and owner of the said petitioners, and each and every of them, there, as his servants and slaves, and not in the county of Washington aforesaid, or elsewhere in the District of Columbia aforesaid, under the direction of the said Gabriel; and that the said petition, during all the time and times aforesaid, has been and yet is pleadable, and might and ought to have been brought, commenced, and tried before the court of the said county of Prince George's only, and not here in the Circuit Court of the District aforesaid, or elsewhere in the said district: And this he is ready to verify; wherefore, since the said petition is brought for the recovery of the freedom of the said petitioners, so residing in the county of Prince George's aforesaid, under the direction of their said master and owner, the said Gabriel prays judgment if the said Circuit Court of the District of Columbia here will or ought to have further cognizance of the petition aforesaid.

G. DUVAL, *in propria personâ*.

This plea was supported by the affidavit of Mr. Duvall, as to the facts therein stated, and a denial of the facts stated in the petition, that he was about to sell the petitioners out of the District to foreign purchasers.

To this plea the petitioners replied, that this Court ought not to be precluded from taking cognizance of the petition, because, by way of replication they say that before and at the time of filing their said petition, the petitioners were here present residing within the jurisdiction of this Court in their own proper persons, in Washington county aforesaid; without this, that at the time and times aforesaid the said petitioners, or any of them, did and do reside in the said county of Prince George's and State aforesaid, under the direction of the said Gabriel, then and during the time and times aforesaid, being the master and owner of the said petitioners, and of each and every of them as alleged in said plea; and of this they put themselves upon the country.

To this replication there was a special demurrer; 1st. Because, although the petitioners have denied that at the time of filing their petition, they were residing in Prince George's county, under the direction of their said master, and have averred that they were here personally at that time, yet they have not averred that they were here under the direction of their master; without which this Court has no jurisdiction of the cause. 2d. Because the said replication, is informal, insufficient, &c.

The 21st section of the act of Maryland, 1796, c. 67, upon which the plea is founded, is in these words, "And be it enacted, That no petition or petitions for freedom shall hereafter originate in the General Court of either shore; but shall commence and be tried only in the county where such petitioner or petitioners shall reside under the direction of his, her, or their master, mistress, or owner; and the court of the county where such petition or petitions shall be preferred, shall have full power and authority to issue process against such master, mistress, or owner for the purpose of compelling his or her appearance, directed to the sheriff of the county where such person or persons shall reside, and such sheriff shall serve and return such process in the same manner as if issued by the county court of his county; and in case of neglect or delay in such sheriff to execute and return such process, he may be fined by the court issuing such process."

Mr. Jones and *Mr. C. C. Lee* contended, that the remedy by petition was local, and confined to the State which gave it, and to the particular case mentioned in the statute; to wit, of a Maryland slave petitioning against a Maryland master, for a cause of freedom acquired or existing under the laws of Mary-

land; and if the Maryland law of 1796 is to be considered as continuing in force in this county of the District after its separation from the State of Maryland, or as reënacted by Congress on the 27th of February, 1801, and to be so modified in its construction as to fit it to the circumstances of this county, then the case must be that of a slave residing here under the direction of the master, also residing here. The slave must have been voluntarily brought to this county by the master; otherwise he cannot be considered as residing here under the direction of his master. If the Maryland statute is adopted, the locality of the action is adopted also.

Mr. Key, contra. If the action is local under the Maryland statute, it is only local as to the several counties in that State; but as there is only one county in this district in which the Maryland laws have been adopted, the question of locality under the 21st section of the act of 1796, cannot arise here. If Mr. Duvall had been sued upon a promissory note, or in any other transitory action, he might as well plead the act of Maryland, which provides that no man shall be sued out of the county in which he resides. The Act of 1796, does not give the right to petition for freedom; it existed long before.

Mr. Jones, in reply. No State courts have jurisdiction of a right to freedom acquired under the laws of another State. It is exclusively within the cognizance of the State in which the right was acquired. The law which forbids the suing of a man out of his own county is applicable to the remedy; but the Act of 1796 relates to the right of action. It is a law purely of State policy. The petitioner must be here held in bondage; the wrong must be done here, the right must accrue here; a petition for freedom can only be maintained here against a person resident here, by a petitioner residing here. A colored man is *primâ facie* a slave; he can, therefore, only sue in the mode given by statute. The act, in effect, says, that no colored person shall be permitted to sue, unless he reside here under the direction of his master, a resident of the District. The remedy and the jurisdiction are peculiar; they are applicable only to Maryland negroes.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*)

The object of the 21st section of the Maryland Act of 1796, c. 67, seems to have been to prevent the filing of petitions for freedom in the General Court, and to confine the original jurisdiction, in such cases, to the county courts; but not to the court of the county in which the master should reside; for the act provides expressly for the case of a petition filed in one county against a master residing in another county, by authorizing the

court of the county in which the petition is preferred, to issue process to compel the appearance of the master, directed to the sheriff of the county in which the master resides; which the sheriff is to serve and return as if issued by the court of his own county. In whatever county the petitioner might be, if he was under the control of his master, he might be said to be residing in that county under the direction of his master.

If he were taken up as a runaway, and confined in the county jail, by authority of his master, he would be residing there under the direction of his master, and might there petition for his freedom. But it seems to us that the legislature contemplated only such colored people as should be claimed as slaves by residents of Maryland. If a colored person, born free in Maryland, but held as a slave in Virginia, should escape into Maryland, in what county in Maryland could he be said to be residing under the direction of his master? Yet if he were taken up in Maryland as a runaway, we presume the courts of that State would not refuse to hear his petition.

If the object of the act was to ascertain which of the county courts should have jurisdiction of the cause, that object was only applicable to the jurisdiction of the county courts of Maryland; and it could not be contended that, if the master resided in a county of Virginia, the law of Maryland would give jurisdiction to the county courts of Virginia; nor would a Maryland court be deprived of its jurisdiction, by the plea that the petitioner was residing in Virginia, under the direction of his master; much less would it be deprived of its jurisdiction by a law of Virginia, which should authorize a person, holden in slavery, to sue for his freedom in that county only in which his master should reside.

The law of Maryland has been adopted as the law of this part of the District,—of this county only; and is to be considered as if enacted here, *totidem verbis, mutatis mutandis*. In such case, it can operate only upon such counties as may be formed out of this part of the District; and, as its object in Maryland was only to designate the courts of that State which should have jurisdiction of such causes, it has here no subject to operate upon, inasmuch as we have only one county. It is a law not applicable, in that respect, to the present condition of this part of the District; and, therefore, was either not adopted, or is wholly inoperative.

We consider the negative averment in the defendant's plea, contained in the words — “And not in the county of Washington aforesaid, or elsewhere in the District of Columbia aforesaid, under the direction of the said Gabriel,” as an immaterial aver-

ment; for those words, "under the direction of the said Gabriel," qualify or modify the whole sentence, and spoil what we should, without them, consider as a very material, and, indeed, the only material averment in the plea. For if the petitioners were not here at the time of filing their petition, but were residing with their master in Prince George's county, in Maryland, this Court has no jurisdiction of the cause. The plea does not deny that they were then residing here, but only that they were not residing here under the direction of their master; which is a negative pregnant with this affirmative, that they were residing here. If the petitioners were, at the time of filing their petition, residing here, and holden in slavery by the defendant, we think this Court had jurisdiction; and it is certain that this Court has exercised jurisdiction in many such cases. This is the first case, however, in which there has been a plea to the jurisdiction, founded on the twenty-first section of the Act of 1796, c. 67.

The fact stated in the plea, that the petitioners were always residing in Prince George's county, in Maryland, under the direction of their master, is only an argumentative denial that they were here at the time of filing their petition; which is bad upon demurrer. And, if they were not then here, it is not material where they were. The averment, therefore, without denying their residence here, is an immaterial averment.

Both the affirmative and negative averments, therefore, being immaterial, the plea is bad, and judgment on the demurrer must be against the defendant, who has committed the first fault in the pleadings.

It has been said, in argument, that the remedy by petition for freedom is given by the statute of 1796, and must be pursued strictly, according to the statute, and can only be used by those who come within its words; namely, persons residing in the county, under the direction of their masters, &c. But the remedy is not given by that statute. It existed long before, and was in daily use at the time of passing the Act of 1796. That act only takes away the jurisdiction from certain courts; and does not deprive any person of a remedy which he before had, if he pursues it in the proper court. There is no reason to suppose, that the legislature intended altogether to deprive any class of persons of the protection of the laws. There is no statute which expressly gives to a person, held in slavery, a right to sue for his freedom. The remedy was probably adopted in analogy to that given "by way of petition," in cases of complaints between masters and servants, under the thirtieth and thirty-first sections of the Act of 1715, c. 44, and was probably in use from that time until the passing of the Act of 1796. Nor can the

action, or the cause of action, be considered as local. Whenever the master exercises his power over the supposed slave, there the right of action exists. It is, in its nature, strictly personal.

It is suggested, also, that, as the right depends upon the law of Maryland, it can be tried only in the courts of Maryland. But there is no foundation for such a doctrine. Personal rights, acquired by the laws of Maryland, follow the person everywhere, unless they are such as, in their nature, cannot be enjoyed elsewhere.

It is said, also, that the twenty-first section of the Act of 1796 regards Maryland negroes only. This is probably true. But that section is restrictive only, and therefore restrains only Maryland negroes from suing in certain courts; so that if it be adopted as the law here, it would only restrain negroes resident in this part of the District, and only in regard to their choice of the tribunal, in case there were more than one, in this part of the District.

It is true, as alleged in argument, that the injury of which the petitioners complain must be an injury committed here. There must be a holding in slavery here, to give this Court jurisdiction; but it is not true that this Court has only jurisdiction of a right of freedom which accrued here. If the defendant has a right to hold the petitioner in slavery in Maryland, by the laws of Maryland, he has a right to hold him here, unless the petitioner has acquired a new right to his freedom. So if the petitioner acquired a right to freedom in Maryland, he is free here.

The motion of the petitioners, to amend their replication a second time, was objected to as unreasonable, inasmuch as a judgment against them upon this demurrer would only remit them to their proper tribunal, that is, the County Court of Prince George's county, in Maryland.

The petitioners sue *quasi in formâ pauperis*, and the Court ought to see that they are not entrapped in the subtleties of special pleading.

If this Court has jurisdiction of their cause, it ought to exercise it; if it has not, it will not usurp it. If the Court had given judgment against the petitioners, upon the pleadings, as they stood before the amendment, and should afterwards have seen that they could be so amended, consistently with the truth of their case, as to give jurisdiction to this Court, we presume it would have permitted the amendment to be made; especially if it should have appeared, as was probably the case, that the defendant had amended his plea after the first replication

was filed. The amendment of the replication, however, does not alter the opinion of the Court as to the insufficiency of the plea.

The defendant, afterwards, by leave of the Court, withdrew his demurrer to the replication, and the cause, at a subsequent term, was tried upon its merits, and verdict rendered for the petitioners. No writ of error was taken out.

UNITED STATES v. ANN ROYALL.

An indictment, charging the defendant with being a common slanderer, or common brawler, is not sufficient. It should charge the defendant as a common scold, or common barrator, in technical language ; these being the only indictable offences of that class.

THE indictment in this case contained three counts :

1. The first count charged that the defendant, " being an evil-disposed person, a common slanderer and disturber of the peace and happiness of her quiet and honest neighbors, on the 1st of June, 1829, and on divers days and times, as well before as afterwards, was, and yet is, a common slanderer of the good people of her neighborhood, in which she, the said Ann, resides, that is, at the county aforesaid, and on divers other days and times, as well before as afterwards, at the county aforesaid, in the open and public streets, in the city of Washington, in the county aforesaid, in the presence and hearing of divers good citizens of the said county, did falsely and maliciously slander and abuse divers good citizens of the said county, to the common nuisance of the good citizens of the United States, residing within the county aforesaid, to the evil example, &c., and against the peace and government of the United States."

To this count there was a demurrer.

2. The second count charged her as a common scold.

To this count she pleaded not guilty.

3. The third count commences like the first, and charges that, on the 1st of June, &c., she was, and yet is, a common brawler and sower of discord among her honest and quiet neighbors ; and on the 1st of June, &c., at, &c., in the open and public streets of the city of Washington, in the county aforesaid, did annoy and disturb the good people of the United States, residing in the county aforesaid, by her open and public brawling, and public slanders, to the common nuisance of the good citizens of the United States, residing within the county aforesaid, to the evil example, &c.

To this count there was also a demurrer.

CRANCH, C. J., delivered the opinion of the Court, as follows, (THRUSTON, J., dissenting.)

The first and third count of this indictment seem to us to be clearly bad, because they want that technical description which is necessary to charge the defendant as a common scold or barratrix, which are the only indictable offences of this class.

Thus, in the case of *Margaret Cooper*, 2 Str. 1246, "she was indicted for being a common and turbulent brawler and sower of discord among her quiet and honest neighbors, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst her majesty's liege people, *contra pacem*, &c.

"It was moved in arrest of judgment that the charge was too general, and did not amount to being either a barrator or common scold, which are the only instances in which a general charge will be sufficient.

"It was likewise objected, that, if the words did amount to a description of a scold, yet it should be laid *ad commune nocumentum* of her neighbors; for every degree of scolding is not indictable. And the court was of opinion (*absente* C. J.) that the judgment ought to be arrested on both exceptions, for none of the words here used are the technical words; and it must be laid to be to the common nuisance."

So also in the case of *Rex v. Hardwicke*, 1 Sid. 282, *communis vicinorum suorum oppressor* was adjudged bad, because the word "*oppressor*" was uncertain; and that in such indictments the word *barrectator* ought to be used, "which is a word of art," "and all the other judges agreed that the indictment is not good without the word '*barrectator*;' and their great reason was that all the precedents are so, and that '*barrectator*' is a word of art in such a case; but they said that the finding him to be a common oppressor of his neighbors had been good evidence to find him guilty of barratry, and therefore they bound him to his good behavior."

So in the case of *Rex v. Taylor*, 2 Str. 849, "an indictment was quashed for generality, being *Calumniatrix, et communis et turbulenta pacis perturbatrix, ac lites, rixas et pugnas movit et incitavit, et quendam Josephum Atherton, verbis, contumeliis et opprobriis abusa fuit in domo ipsius J. A.*"

So in Roll. Ab. Indictment, K. "*Defamator bonorum nominis et famæ*, is not good without showing some particular matter. So *defamator, vexator, et oppressor multorum hominum*, common forestaller, common thief; so also common disturber of the peace of the lord the king, and that he unjustly excited and procured

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divers suits and discords, as well between his neighbors as between divers liege subjects of the lord the king," &c.

So also in the case of *The Queen v. Foxby*, 6 Mod. 11. "Judgment was arrested because it was that she was *communis calumniatrix*, which is not the Latin word for scold, but *rixatrix*."

All these have been decided not to be indictable offences. Upon the authority of these cases, we think that the judgment upon the first and third counts of this indictment must be for the defendant.

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Upon the trial on an indictment for being a common scold, particular instances of scolding may be given in evidence.

After conviction as a common scold, the Court will order the defendant, if in court, to give security for her appearance in court, from day to day, to hear the judgment of the Court, and in the mean time to be of good behavior.

The law against a common scold, as being a common nuisance, is not obsolete, although the punishment by ducking may be. It is still punishable, as a nuisance at common law, by fine and imprisonment.

Anger is not a necessary ingredient in scolding.

THE first and third counts of this indictment having been adjudged bad upon demurrer, [*ante*, 618,] the cause now came on for trial upon the general issue on the second count.

Mr. Swann, for the United States, called a witness to testify to a particular instance of the defendant's scolding.

Mr. Coxe, for the defendant, objected that particular instances could not be given in evidence, the offence consisting in her being a common nuisance.

The COURT, however, (*nem. con.*) overruled the objection.

The jury found the defendant guilty, and her counsel moved in arrest of judgment, and for a new trial; whereupon, at the motion of the attorney for the United States, the defendant was required to enter into recognizance with one or more good sureties, to appear in Court from day to day, to hear the judgment of the Court, and in the mean time to be of good behavior.

The cause was argued, on the motion in arrest and for a new trial, by *Mr. Swann*, for the United States, and *Mr. Coxe*, for the defendant.

Mr. Coxe contended that, by the common law, the only punishment of a common scold was ducking — a mode of punishment which is obsolete in England, and was never inflicted in Maryland, under whose common law this prosecution has been commenced. That it certainly is an unusual punishment, and is therefore forbidden by the bill of rights of Maryland. That as

the punishment is taken away, the common law which inflicted it is also abrogated. To show that ducking was the only punishment of the offence, he cited Jac. Law Dict. tit. Scold; Rees's Cyclopædia, and Webster's Dictionary, same title; 1 Hawk. 198, 200; 3 Inst. 219; Jac. Dict. tit. Castigatory. Upon the motion for a new trial, he contended that anger and turbulence were necessary to constitute unlawful scolding, and that there was no evidence of either. The jury also had taken out with them the indictment containing the two bad counts which had been quashed by the Court.

CRANCH, C. J., delivered the opinion of the Court, (*nem. con.*) as follows:

The defendant has been convicted upon the second count of this indictment, which is in the following words:

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Ann Royall, being an evil disposed person as aforesaid, and a common scold and disturber of the peace of her honest and quiet neighbors, on the first day of June, in the year of our Lord one thousand eight hundred and twenty-nine, as aforesaid, at the county of Washington aforesaid, and on divers other days and times, as well before as after, was and yet is a common scold, and disturber of the peace and happiness of her quiet and honest neighbors residing in the county aforesaid; and that the said Ann Royall, on the first day of June, in the year aforesaid, and on divers other days and times, as well before as afterwards, in the open and public streets in the city of Washington, in the county aforesaid, did annoy and disturb the good people of the United States residing in the county aforesaid, by her open, public, and common scolding, to the common nuisance of the good citizens of the United States residing within the county aforesaid, to the evil example of all others in like cases offending, and against the peace and government of the United States."

The counsel for the defendant has moved the Court to arrest the judgment, and to grant a new trial.

In support of the motion to arrest the judgment, it is contended that the law for the punishment of common scolds is quite obsolete in England, and never was in force in this country; that it is a barbarous and unusual punishment, and therefore is prohibited by the bill of rights annexed to the Constitution of Maryland, under whose supposed common law this indictment is framed; that the punishment of ducking was the appropriate and only punishment by the common law of England; and that, as that mode of punishment is obsolete there, and never was in use here, the law, which considered scolding

as an indictable offence, is obsolete also. That the term "scold" is of uncertain signification; that the offence is not well defined in any adjudged case, or in any elementary writer. Jacob, in his Law Dictionary, says: "Scolds, in a legal sense, are troublesome and angry women, who, by their brawling and wrangling amongst their neighbors, break the public peace, increase discord, and become a public nuisance to the neighborhood. They are indictable in the sheriff's *tourn*, and punished by the *cucking-stool*."

In order to show that such was the only punishment which could be inflicted upon a scold, the counsel for the defendant cited Jacob's Dictionary, (Tomlin's,) tit. "Castigatory for Scolds," where it is said: "A woman indicted for being a common scold, if convicted, shall be sentenced to be placed in a certain engine of correction called the *trebucket*, *tumbrel*, *tymborrella*, *castigatory* or *cucking-stool*, which, in Saxon, signifies the scolding-stool, though now it is frequently corrupted into ducking-stool, because the residue of the judgment is, that when she is so placed therein, she shall be plunged into the water for her punishment."

And in the case of *The Queen v. Foxby*, 6 Mod. 11, the reporter says: "Note, the punishment of a scold is ducking; and Holt, when the exception was first made, said: "It were better ducking in a Trinity than in a Michaelmas term." And in the same case, in 6 Mod. 178, it is said: "She was convicted by the justices of the peace, at their quarter sessions at Maidstone, upon an indictment for being a common scold, and judgment that she should be ducked; whereupon she brought a writ of error, and hereupon the sheriff let her go at large, there being no fine or imprisonment in the judgment."

And again, in the same case, 6 Mod. 213, upon affidavits that she was so ill that, without danger of her life, she could not come up to assign errors, in person, according to the course of the court, "they enlarged the time till next term, to see how she would behave herself in the mean time; for Holt, Chief Justice, said, ducking would rather harden than cure her; and if she were once ducked she would scold all the days of her life;" a consequence which the Court would hardly have inflicted upon the public, if they could have avoided it by substituting fine and imprisonment for ducking. From these authorities the counsel for the defendant concluded that ducking was the only punishment which could ever have been inflicted upon a scold, by the common law. And to show that that punishment was obsolete in England, he cited the following passage from Jacob's Law Dictionary, tit. "Castigatory:" "Though this punishment is

now disused, a former editor of Jacob's Dictionary (Mr. Morgan,) mentions that he remembers to have seen the remains of one " (a ducking stool,) "on the estate of a relation of his, in Warwickshire, consisting of a long beam or rafter, moving on a fulcrum, and extending to the centre of a large pond, on which end the stool used to be placed."

The only punishment which could be inflicted being obsolete, the counsel for the defendant contended that the offence was no longer indictable, and therefore the judgment ought to be arrested.

But it will be perceived that this argument rests upon the proposition that ducking was the only punishment which could be inflicted for the offence of being a common scold; and that that proposition is supported only by uncertain inferences drawn from a few loose expressions in the books, and chiefly from the word "shall," and the word "residue," in the first passage above cited, from Tomlin's Jacob's Dictionary, tit. "Castigatory." That passage, and particularly those words "shall" and "residue," are copied from 4 Bl. Com. 168, where Blackstone says: "Lastly, a common scold — *communis rixatrix* — (for our law latin confines it to the feminine gender,) is a public nuisance to her neighborhood. For which offence she may be indicted; (6 Mod. 213,) and, if convicted, shall (1 Hawk. 198, 200,) be sentenced to be placed in a certain engine of correction called the *trebucket*, *castigatory*, or *cucking-stool*, which, in the Saxon language, is said to signify the scolding-stool; because the residue of the judgment is that, when she is so placed therein, she shall be plunged in the water for her punishment. 3 Inst. 219."

The authorities, thus cited by Blackstone, do not indicate any opinion that ducking is the only punishment, nor even that it is an indispensable part of the punishment. The argument drawn from the playful expression of Lord Chief Justice Holt, in 6 Mod. 213, does not warrant so grave a conclusion. They were intended, perhaps, only to excite surprise by their exaggeration; for surprise is sometimes an approximation to wit. Nor can such a conclusion be drawn from the language of Hawkins in the passages cited by Blackstone. 1 Hawk. 198, 200.

The first of those passages is this: "Although it hath been said that an indictment of a common scold by the words *communis rixatrix*, which seem to be precisely necessary in every indictment of this kind, is good, though it conclude *ad commune nocumentum diversorum*, instead of *omnium*, &c., perhaps for this reason; because a common scold cannot but be a common nuisance."

The other passage is, (1 Hawk. 200,) — "As to the third

point, namely, in what manner common nuisances may be punished, it is said that a common scold is punishable by being put in the ducking-stool; and there is no doubt but that, whoever is convicted of another nuisance may be fined and imprisoned."

And the passage cited from 3 Inst. 219, seems rather to justify a contrary conclusion. Lord Coke is speaking of the different means of punishment; and, after describing the pillory and tumbrel, he says — "Trebucket, or castigatory, named in the statute of 51 H. 3, signifieth a cucking-stool; and trebucket is properly a pitfall, or downfall, and, in law, signifieth a stool that falleth down into a pit of water, for the punishment of the party in it; and '*chuck*,' or '*guck*,' in the Saxon tongue signifieth to scold or brawl, (taken from *cuckhaw* or *guckhaw*, a bird, *qui odiose jurgat et rixatur*;) and '*ing*,' in that language, (water); because she was, for her punishment, soused in the water; and others fetch it from *cuck-quean i pellex*."

This citation does not justify an inference that the ducking-stool was an instrument appropriated to the punishment of scolds only. It says, for the punishment of the party; and it refers to the statute of 51 H. 3, stat. 6, entitled "*Judicium Pillorie; A Statute of the Pillory and Tumbrel, and of the Assize of Bread and Ale*," "A. D. 1266," by which it is enacted, that "if a baker or a brewer (*braciatrix*) be convict, because he hath not observed the assize of bread and ale," "*patiatur judicium corporis sicut, Pistor collistrigium, et Braciatrix trebuchetum vel castigationem*." (The old translation in the statute-book is — "Then he shall suffer punishment of the body; that is, to wit, a baker to the pillory, and a brewer to the tumbrel, or some other correction.")

It is, therefore, clear, that the punishment of the tumbrel or trebucket, which were the same instrument, was not confined to scolds; and that this citation from Lord Coke does not justify an inference that ducking was the only punishment which could be inflicted upon them. If it should be said that such an inference may be drawn from the etymology of the word "cucking-stool," which he derives from a Saxon word signifying to scold, that inference is rebutted by the more probable etymology given by Burn, (3 Burn's Justice, p. 225,) who says — "The common people in the northern parts of England, amongst whom the greatest remains of the ancient Saxon are to be found, pronounce it ducking-stool, which, perhaps, may have sprung from the Belgic or Teutonic '*ducken*,' to dive under water; from whence, also, probably we denominate our duck, the water-fowl; or, rather, it is more agreeable to the analogy and progression of

languages to assert, that the substantive, duck, is the original, and the verb made from thence; as much as to say, to *duck* is to do as that fowl does." So that the name of the instrument may have been given to it because it is a plunging instrument, and not because it was used for the punishment of scolds only. The words tumbrel, trebucket, castigatory, cucking-stool, and ducking-stool, are used synonymously by the old writers, as well as in the old statutes; so that the observations of Lord Coke in the following passage, from the page cited by Blackstone, (3 Inst. 219,) is as applicable to the trebucket as to the tumbrel — "Now, for that the judgment to the pillory or tumbrel (as hath appeared before,) doth make the delinquent infamous, and that the rule of law is, *Judicium de majore pœna quam quod legibus statutum est non infamum facit, sed per breve de errore adnullari potest*; and again, *Pœna gravior ultra legem posita æstimationem conservat*; that the justices of assize, oyer and terminer, jail delivery, and justices of the peace would be well advised, before they give judgment of any person to the pillory or tumbrel, unless they have good warrant for their judgment therein. Fine and imprisonment, for offences finable by the justices aforesaid, is a fair and sure way."

It is said, however, that this last observation of Lord Coke is confined to offences finable by the justices; and that to argue, from that passage, that a common scold was finable, is to beg the question; as the sentence admits, by implication, that some offences, punishable by the pillory or tumbrel, might not be finable by the justices. In the next sentence, in the same page, however, Lord Coke enumerates many statutes which authorize punishment by the pillory and tumbrel; in some of which the courts are authorized to inflict that punishment in addition to fine and imprisonment, and in others to inflict that punishment alone; which will account for Lord Coke's advice being confined to offences finable by the justices, without admitting that there were any common-law misdemeanors which could not be punished by fine and imprisonment.

*Mr. Chitty (1 Crim. Law, 710,) lays down this general rule, that "every description of misdemeanor, or crime, for which an indictment will lie at common law, not subjecting the offender to a capital penalty, is within the discretion of the judges.

Thus in the case of *The King v. Thomas and wife*, (Hardwicke's Cases, 279,) convicted of keeping a disorderly house, the wife was in prison, but the husband had run away from his bail; affidavits were made that the prisoner was in so weak a condition that a bodily punishment might kill her. "*Per Curiam*: The ordinary judgment in this case is pillory; but, for misdemeanor,

the court is not tied down to any particular punishment; and being a married woman has nothing to pay a fine withal, the punishment must be imprisonment." The judgment was, that she be imprisoned a year, and then to find security for her good behavior for seven years.

It may be observed, also, in the case of *Foxby*, before cited from 6 Mod. 178, that she was a married woman, as appears in p. 213 of the same book; which may account for the judgment not being fine and imprisonment, as well as ducking.

In Bac. Ab., tit. Nuisance, D, it is said — "All common nuisances to the public are regularly punishable by fine and imprisonment, at the discretion of the judges; but in some cases corporal punishment may be inflicted, as in the case of a common scold, who is said to be properly punishable by being put into a ducking-stool.

"Also the offence of keeping a disorderly house is punishable, not only with fine and imprisonment, but also with such infamous punishment as to the court, in its discretion, may seem proper."

We think that, by these authorities, it is clear that Sir William Blackstone, in using the word "shall" in the passage cited, is not to be understood as having used it in its peremptory and obligatory sense, and as intimating that the court was bound to inflict the punishment of ducking upon a common scold, under all possible circumstances; and that, in using the word "residue," it is not to be presumed that he intended to be understood as denying the power of the court to punish any common-law misdemeanor by fine and imprisonment. It is true, that the court, in its discretion, might sentence the offender to be ducked only; in which case, it would be part of the judgment that she should be placed in the stool; and the "residue," in that case, would be, that she should be plunged in the water. And in this sense only can Blackstone be understood, consistently with the general principles of law and the authorities cited.

If a part of the common-law punishment of the offence has become obsolete, the only effect is, that the discretion of the Court is so far limited. The offence is not obsolete, and cannot become obsolete so long as a common scold is a common nuisance. All the elementary writers upon criminal law admit, that being a common scold, to the common nuisance of the neighborhood, is an indictable offence at common law.

The Court is therefore of opinion, that although punishment by ducking may have become obsolete, yet that the offence still remains a common nuisance, and, as such, is punishable by fine and imprisonment, like any other misdemeanor at common law;

and that, therefore, the motion in arrest of judgment must be overruled.

The motion for a new trial rests upon two grounds :

1st. That a woman cannot be guilty of scolding unless the words were spoken in anger, and with turbulence ; and that the Court permitted evidence to be given of insulting and provoking language, uttered by the defendant in an insulting and provoking manner, but not in an angry and turbulent manner ; and that there were only two or three instances proved of the language being used by the defendant in anger.

2d. That the jury was permitted to take out the indictment which contained the two counts which the Court had adjudged to be insufficient, without any information to the jury that those two counts were not to be considered by them.

1. As to the first ground of new trial, the Court, at the trial, overruled the objection to the evidence, being of opinion that the insulting and provoking language might be given in evidence, although not spoken in an angry or turbulent manner ; which opinion, they still think, is correct, and that its admission is not a sufficient reason for granting a new trial.

2. The second reason is, that the jury took out with them the indictment containing the two counts which the Court had, upon demurrer, adjudged to be insufficient.

Those counts were not matter of evidence ; nor could they have been so understood by the jury ; and they could not be separated from the good count, upon which the issue was joined. The indictment was, as usual, delivered to the jury when they retired, without objection by the defendant, or her counsel ; and all the facts averred in those counts were matters which, if proved, were evidence upon the issue which the jury was sworn to try. If issue had been joined upon all the three counts, and a general verdict of guilty had been rendered, the judgment could not have been arrested on account of the two bad counts ; and yet the jury might have given their verdict, in fact, upon evidence applicable only to one of the bad counts. It is true that it might be the ground of a motion for a new trial ; but, upon that motion, the Court, before they would grant a new trial, must be satisfied that the evidence was not sufficient to support the good count.

So here, although the jury might have supposed they were trying an issue upon all the counts, and may have given their verdict, because they thought one of the bad counts was supported, if the Court is satisfied that the evidence was sufficient to support the good count, the court ought not, in its discretion, to grant a new trial.

The Court is perfectly satisfied that the evidence in that respect was sufficient, and must, therefore, overrule the motion.

The defendant was sentenced to pay a fine of \$10, and to give security for her good behavior for one year, and to stand committed until the fine and costs should be paid, and the security given.

ARNOLD BOONE *et al.* v. SMALL *et al.*

It is no equitable ground for enjoining a judgment at law, that the complainants have commenced a suit at law against the plaintiffs at law to recover unliquidated damages upon a contract, unless those plaintiffs are insolvent, or some good ground exists to believe that the complainants would not be able to obtain payment of the damages which they might recover.

BILL for injunction, demurrer and answer, and motion to dissolve the injunction.

The bill states that Boone and Johns, under the name of Arnold Boone & Co., contracted with Lawrason and Fowle and G. Harrison for the delivery by them to the complainants, of a certain quantity of plaster of Paris, by a certain day, which they failed to do, whereby the complainants sustained damage to a greater amount than the judgment recovered by one Small upon a note given by the complainants to him for a load of plaster, delivered by him under the contract with Lawrason and Fowle, and G. Harrison. That they had supposed that they could set off those damages in the suit at law, against that note; but being mistaken, they have brought suit at law against these defendants, but they are pressing their execution against these complainants.

The bill also states that the complainants, about the time they gave their note, lent to the said Harrison, one of the defendants, another note of about the same amount, which they have been obliged to take up, and which was always understood and intended by them, and they believe by the said Harrison, to go in settlement of the aforesaid note; wherefore they pray injunction, &c., until the decision of their suit at law for damages, or the further order of the Court.

The defendants answered that the suit at law was, upon the trial, duly nonsuited, and as to the residue of the bill, they demurred, and the cause was set for final hearing by consent.

Mr. Marbury, for the defendants, contended that there was no equity in the bill; and that the pendency of a suit at law for unliquidated damages created no equity against a judgment at law. *Kempshall v. Stone*, 5 Johns. Ch. Rep. 195; *Lansing v. Eddy*, 1 Johns. Ch. Rep. 50; *Barker v. Ellis*, 1 Johns. Ch. Rep. 466; *Barrett v. Floyd*, 3 Call, 464; *Billon v. Mitchell*, 1 Atk. 126.

Mr. Key, and Mr. Dunlop, contra. The demurrer admits that the complainants have suffered damage, by the non-performance of the contract, to a greater amount than the judgment at law. There was a good ground of equity when the injunction was granted, and the Court having once possession of the case, will proceed to final relief, although that relief might be obtained at law. 1 Randolph, 300; 6 Mun. 464. The complainants supposed they could set off these damages at law, and therefore did not commence their action simultaneously with that of Small. This mistake is a ground of equity. Equity will relieve if the complainant has not had a fair trial at law. The lent note is also an equitable set off.

CRANCH, C. J. This bill certainly never contained any ground of equity, even for an injunction; for the pendency of a suit at law for unliquidated damages, is no reason why the plaintiff at law, who has recovered his judgment, should not avail himself of it, unless his insolvency be averred, or some ground to believe that the complainant, if he should recover damages in his cross-action, would not be able to get payment from the plaintiff; such as his having no visible property, or being about to leave the country, &c.

The note, lent by the complainants to Harrison, could not either at law or in equity, be set off against a debt due to Lawrason and Fowle and Harrison; and it is evident, from its date, (15th October, 1818, at 90 days,) that it could not, when it was lent, be intended as a set-off against the complainants' note to Small, which fell due about the 1st of March, 1819, and being at ninety days, must have been given about the 1st of December, 1818. But if it be a set-off, it might as well be set off at law as in equity, and no sufficient reason is stated why it was not.

I am, therefore, clearly of opinion that this injunction ought to be dissolved; and as the cause is, by consent, set for final hearing, that the bill should be dismissed.

MORSELL, J. concurred; THRUSTON, J., absent.

WILLIAM COX v. TOBIAS WATKINS.

If goods be attached under the Maryland act of 1795, and the defendant be taken on the *capias* before the return of the attachment, it will be dissolved upon the personal appearance of the defendant in custody being entered.

THE marshal had attached certain goods of the defendant under the Maryland act of 1795, c. 56, during his absence. Before the return of the attachment, the defendant was commit-

ted upon a criminal charge, so that the marshal was bound to return the *capias* "*cepi*," and being brought into Court, in custody of the marshal, his appearance in proper person was entered by the clerk.

Mr. Coxe, for the defendant, moved that the attached effects should be discharged, as the marshal was bound to take the defendant upon the *capias*, and the plaintiff had no right to proceed against the goods while he had the body of his debtor in custody.

The Court being of that opinion, ordered the goods to be discharged. *Mr. Wallach*, for the plaintiff.

CALLAN, Administrator of Delany, v. KENNEDY.

An action cannot be maintained against the husband for the debt of the wife, after her death, upon an express promise made by the husband, in the lifetime of the wife, upon no other consideration than his liability as husband for the debt of the wife, and the property which he acquired in right of the marriage.

A VERDICT was taken for the plaintiff for \$300, subject to the opinion of the Court upon a case which stated, that Margaret Delany, being indebted to the plaintiff as administrator of Thomas Delany in the sum of \$300, intermarried with the defendant, who, in right of the marriage, received more than sufficient property to pay the debt; which property remained in his possession after the death of his wife. During the coverture he expressly promised to pay the debt; but made no new promise after her death. This suit was brought after her death.

CRANCH, C. J., delivered the opinion of the Court.

The question arising upon this state of the case seems to be, whether an action can be maintained against the husband for the debt of the wife, after her death, upon an express promise made by the husband in the lifetime of his wife, upon no other consideration than his liability, as husband, for the debt of his wife, and the property acquired by him in right of the marriage.

It was decided in *Mitchenson v. Hewson*, 7 T. R. 348, and in the case of *Rann v. Hughes*, there cited, that the promise can only be coextensive with the consideration. During the coverture, the husband was bound to pay, whether he received property with his wife, or not; and his promise made during the coverture, did not increase his obligation, or create a new contract, unless it were made upon a new consideration, other than his previous obligation as husband, and his acquisition of the property of his wife, in right of the marriage. (See *Heard and wife v. Stamford*, 3 P. Wms. 411.)

The COURT is, therefore, of opinion that the plaintiff cannot recover in this action, and that judgment of nonsuit must be entered.

JAMES MANDEVILLE v. McDONALD, Administrator of S. Eliot, and BRENT, McDONALD, and MAY, Trustees of S. Eliot, and the Heirs and Terre-tenants of S. Eliot, deceased.

The remedy for a defective return of a *scire facias* against terre-tenants is not a plea in abatement, nor a motion by the defendants to quash the writ, but a motion to quash the return; but the return may be amended. The defendants may lay a rule on the plaintiff to declare; and the marshal's return of the *scire facias* will make part of the declaration, and the defendants will have time to plead.

The terre-tenants warned may plead, in delay of execution, that there are other terre-tenants, in the same county, not summoned.

SCIRE FACIAS against the administrator, trustees, and terre-tenants of S. Eliot, deceased.

After stating that a judgment, in favor of the plaintiff, was rendered against the said S. Eliot on the 25th of January, 1820, it commanded the marshal, "That you make known to the heirs of the said S. Eliot, deceased, and the terre-tenant or terre-tenants of all the lands, lots, squares, and tenements in your bailiwick, whereof the said S. Eliot on the 25th of January, 1820, (on which day the judgment aforesaid was rendered,) or ever afterwards was seized, and to William Brent, John G. McDonald, and Frederick May, trustees, and to John G. McDonald, administrator of the said S. Eliot, that they and all of them be and appear," &c. "to show cause, if any they have, why the damages, costs, and charges aforesaid ought not to be levied on those lots, squares, lands, and tenements, and paid to the said James Mandeville, according to the force, form, and effect of the recovery aforesaid, if he the said James Mandeville shall think fit," &c.

The return of the marshal is as follows:

"*Scire feci* William Brent, one of the trustees, November 13, 1827, in presence of J. H. B. and E. M., of the lots below mentioned; *scire feci* John G. McDonald, one of the trustees and administrator of the same lots, November 19th, 1827, in presence of J. H. B. and E. M. Also *scire feci* Catharine Mary Eliot, terre-tenant and heir of said lots, and Wallace Eliot, terre-tenant and heir of said lots, November 19, 1827, in presence of R. B. and A. S. W. Also *scire feci* William Henry Eliot, another terre-tenant and heir, November 19, 1827, in presence of H. M. M. and S. L. D. Also *scire feci* Johnson Eliot, another terre-tenant and heir of said lots and squares, November 19, 1827, in

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presence of R. K. and Z. D. B. Also *scire feci*, November 20, 1827, Frederick May, trustee, in presence of S. M. and H. C., lots 9, 10, 11, 12, 13, 15, 16, in square 299 in the city of Washington, all square 354," (&c. &c., designating 110 lots and 10 whole squares,) "all the above lots and squares lying in the city of Washington; also *scire feci* James Greenleaf and William A. Bradley, terre-tenants of square 473, lying in the said city — James Greenleaf, November 19, 1827, in presence of J. H. B. and E. M., and William A. Bradley in presence of A. B. T. and J. H. B. "TENCH RINGGOLD, Marshal."

The above return was afterwards amended by adding these words, "the above named persons being all the terre-tenants in my bailiwick."

Mr. Bradley, for the defendants, moved to quash the *scire facias*. 1st. Because it does not state that the land was the property of *Mr. Eliot*. 2d. Because the return does not state that the terre-tenants summoned were all the terre-tenants of the lands. 3d. Because there ought to have been a previous *scire facias* against the personal representatives of *Eliot*; and cited 1 Str. 401; *Carthew*, 105, 107; 2 Saund. 72, R. B.; *Tidd*, App. 337, No. 71; 2 Saund. 7, n. 7 and 8, n. 10; *Tidd*, 1037; 1 Salk. 52; 2 Salk. 601, and 2 Saund. 9, 23; *Tidd*, 1043, and 2 Har. Ent. 534, and *Baker v. French*, in this Court, December term, 1824, (2 Cranch, C. C. 539) were cited for the plaintiff by *Mr. Morfit*, who contended that the defendants should have pleaded in abatement.

Mr. Bradley, in reply, observed that the case of *Baker v. French* was a special *scire facias*, naming the terre-tenants in the writ, whereas the present *scire facias* was general.

CRANCH, C. J. The question is, whether the motion to quash the *scire facias* is the proper remedy.

After looking at all the cases cited, and many more, I think it is not. The only case which seemed to justify that course is *Hillier v. Frost*, 1 Str. 401, but that case has been misunderstood. It was not a rule to amend the sheriff's return of the writ, but to amend the writ of *scire facias* itself, by making it returnable on Saturday instead of Friday, which was the feast of St. Martin. The motion was made by the plaintiff; but Sir John Strange, who was the plaintiff's counsel, remarks that "he had little to say for it," "so it was discharged; and he moved to quash the writ, which was ordered accordingly."

I have seen no case in which a *scire facias* has been quashed, on motion of the defendant, for a defective return of the sheriff, there being no fault in the writ itself.

The defendants may lay a rule on the plaintiff to declare. The marshal's return will make part of the declaration, and the defendants will have time to plead such pleas as they may be advised to plead.

The other judges assented.

In this cause, at the last term, the Court decided that W. A. Bradley, one of the tenants summoned, had a right to plead in delay of execution, that there were other terre-tenants, of other lands, not summoned; and that the plea offered by him, when put into proper form, should be received.

At the present term, *Mr. Morfit*, for the plaintiff, moved for judgment by default against all the terre-tenants summoned, and against "John G. McDonald, one of the trustees, and administrator of the same lots," and against "Wm. Brent, one of the trustees," and against "Frederick May, one of the trustees."

Mr. W. A. Bradley now offered his amended plea; and W. Brent, F. May, and John G. McDonald offered to plead.

After considering the cases and authorities cited in the note below,

The COURT received the plea offered by *Mr. Bradley*, and permitted the defendants to plead, and overruled the motion of *Mr. Morfit* for judgment by default.

The cause was then continued, to make up the issues, and was continued from term to term until term, when it was placed by consent upon what is called the *stet* docket, where it has remained ever since.¹

¹ The plea of *Mr. Bradley*, it is understood, was in this form: — And the said Wm. A. Bradley, by his attorney, comes and prays a hearing of the writ of *scire facias* aforesaid and of the return thereof, and they are read to him in these words, namely, (here insert them,) which being read and heard, the said William A. Bradley saith that he ought not now to be put to answer the declaration of the said James Mandeville, nor to the writ and return aforesaid; because he says that there were, at the time of the said return of the said writ of *scire facias*, and yet are, other tenants of certain lots, squares, pieces, and parcels, lying and being in the city of Washington, in the county of Washington aforesaid, who are not named in the said writ, or in the said return, and who have not been returned summoned; of which said lots, squares, pieces, and parcels of land the said Samuel Eliot was seized in his demesne as of fee, on and after the time of the rendition of the said judgment against him as aforesaid,

That is to say — That the president, directors, and company of the Bank of Washington were, at the said time of the said return, and now are, tenants of the lots numbered in the said city, of which said lots the said Samuel Eliot was seized in his demesne as of fee at the time of the said rendition of the said judgment.

And that one Anthony Preston was, and yet is, tenant of lot in the said city, of which said lot the said Samuel Eliot was seized in his demesne as of fee, at the said time of the said rendition of the said judgment.

And that one Peter Lenox was and is tenant of, &c.

And that one Lewis H. Machem was and is, &c.

Mandeville v. McDonald.

Upon the subject of *scire facias* against terre-tenants, and the lien of a judgment upon the lands of the debtor, see the following cases and authorities :

Hillier v. Frost, 1 Str. 401; *Panton v. Terre-tenants of Hall*, Carth. 105; *Registrum Judiciale*, 57; *Bicknold v. Owen*, Dyer,

And that one William Douglass was and is, &c.

And that one Tobias Simpson was and is, &c.

And the said Wm. A. Bradley further says that no writ of *scire facias*, issued out of this Court, has been served upon the said president, directors, and company of the Bank of Washington, nor upon the said Anthony Preston, nor upon the said Peter Lenox, nor upon the said Lewis H. Machem, nor upon the said William Douglass, nor upon the said Tobias Simpson, to show cause why the damages, costs, and charges, so as aforesaid recovered against the said Samuel Eliot, should not be levied on the said several lots, squares, pieces, and parcels of land, of which the said president, directors, and company of the Bank of Washington, and the said Anthony Preston, Peter Lenox, Lewis H. Machem, William Douglass, and Tobias Simpson were and are, respectively, tenants as aforesaid. And this the said Wm. A. Bradley is ready to verify; wherefore he prays judgment whether he shall be put to answer to the said declaration of the said plaintiff, or to the said writ and return, until the said president, directors, and company of the Bank of Washington, and the said Anthony Preston, and the said Peter Lenox, and the said Lewis H. Machem, and the said William Douglass, and the said Tobias Simpson, respectively, tenants as aforesaid, shall have been warned to show cause as aforesaid.

The defendants W. Brent, F. May, and J. G. McDonald, after oyer of the writ of *scire facias* and the return thereof, say, that the said writ of *scire facias*, and the said return thereof, and the declaration of the said James Mandeville thereupon, are not sufficient in law for the said James to have execution of the said damages, costs, and charges in the said writ and declaration mentioned against them, the said W. Brent, F. May, and J. G. McDonald, of or upon the aforesaid lots, parcels, and squares of land set forth in the said return, or of any part thereof to be levied; and that the said W. B., F. M., and J. G. McD. are not bound by the law of the land to answer thereunto, and that they are ready to verify; wherefore, for that the same are insufficient in law as aforesaid they pray judgment, and that the said James may be precluded from having his execution aforesaid against them in manner and form as in and by his said declaration he has prayed.

And for causes of demurrer in this behalf they show the following, to wit :

1. That they ought not to be impleaded jointly with the heirs, administrator, and terre-tenants of the said Eliot.

2. That it does not appear by the said writ of *scire facias* or return, or by the declaration thereupon, that any writ of *scire facias* against the administrator of the goods, chattels, rights, and credits of the said Eliot had been previously issued at the suit of the said James. Tidd, 1032.

3. That the said W. B., F. M., and J. G. McD. are not liable, in any manner, as trustees, to contribute with the heirs and terre-tenants of the said Eliot, in the payment of the damages, costs, and charges, in the said writ mentioned; nor are liable in any manner to the execution thereof, they not being returned as terre-tenants.

4. That in and by the said writ of *scire facias*, the said W. Brent, F. May, and J. G. McDonald are only permitted to show cause, &c., "if the said James Mandeville shall think fit."

5. That it is not stated in the said writ that they, the said W. B., F. M., and J. G. McD. are trustees of, or in any manner interested in, any part of the lands of which the said S. Eliot was seized in fee, at the time of, or at any time after the rendition of the said judgment.

6. That the said marshal, in his said return, has not stated that any of the lots, parcels, or squares therein mentioned, were or are lots, parcels, or squares of land or lands and tenements of which the said S. Eliot was seized in fee at the time of the rendition of the said judgment, or at any time thereafter.

Hardy v. Redman's Administrator.

207, (b) ca. 15; *Smarte v. Edsun*, 1 Lev. 30; *Adams v. Terre-tenants of Savage*, 2 Salk. 601; 6 Mod. 199, 226; Tidd, 1032; 2 Saund. 7, n. 4; *Beresford v. Cole*, Comb. 282; *Jefferson v. Morton et al.* 2 Saund. 7; *Gwinn v. Lloyd and Bold*, 1 Keb. 54, 351; *Michell v. Croft, Terre-tenants of Rivet*, Cro. Jac. 506; *Phelps v. Lewis*, 2 Saund. 210, e, in note 1; *Harbert's case*, 3 Co. 14, (b); *Dyer*, 331, (b,) pl. 23, 24; *Clark v. Hardwicke*, Moore, 524; 2 Har. Ent. 174, 257, 444, 496, 534, 583, 749, 763, 765; Co. Ent. 619, 620, 621, 622, 623, 624; Stat. 5 Geo. 2, c. 7; Chancellor Kilty's Report on the English Statutes, 29 Car. 2, c. 3, § 16, (p. 241,) and on 5 Geo. 2, c. 7, § 4, (p. 249); *Ridgeley's Executor v. Gartrell*, 3 Har. & McHenry; 2 Inst. 396; *Palmer's case*, 4 Co. 74; Heath's Maxims, 3; 2 Hawk. 153, 253, § 119 123, 126; Barnes's Notes, 207, 210, 213, 214, 218, 221; Cro. Jac. 119; *Dyer*, 208; *Nicholson v. Sligh*, 1 Har. & McHenry, 434; *Arnott and Copper v. Nicholls*, 1 Har. & J. 471, 473, n. a; *Hindman v. Ringgold*; *McElderry v. Smith*, 2 Har. & J. 72; Tidd, 1046; *Eyres v. Taunton*, Cro. Car. 295, 312; *Baker v. French*, in this Court, December term, 1824, (2 Cranch, C. C. 539); 2 Saund. 8, note 10; Tidd, 1003, 1021; App. 437; Stephen on Pleading, 63, 126, 128, 239, 430; *Owens v. Norwood*, 2 Har. & J. 101; *Beatty v. Chapline*, 2 Har. & J. 26.

HARDY, Executor of Beall, v. REDMAN'S ADMINISTRATOR.

A devise to the executor in trust to apply the rents and income to the support of the widow, with power to sell the estate if the income should not be sufficient, is a devise in fee to the executor; and he is entitled to receive the rents accruing after the death of the wife.

THIS suit was docketed by consent, to recover the rents which accrued after the death of the testator's wife.

The litigation arose upon the following clause of the will of Samuel Beall:

"And it is my will that after the payment of my debts and funeral expenses, all my other property, (except heretofore reserved,) real, personal, and mixed, be placed in the hands of my executors hereafter named, the proceeds thereof to be applied to the support of my said wife, Anne Beall, in such manner as they shall think proper; and in case the rents and income of my estate should not be found sufficient for the above purpose, then the said executors are hereby empowered to sell such estate, and vest the proceeds thereof in such stock as they may think proper, for the support of the said Anne Beall; and at the death of my

said wife Anne Beall, the whole of the remainder of my estate to devolve on my heirs at law."

The case stated, for the opinion of the Court, is — That on the 27th of August, 1811, Samuel Beall was seized in fee of a lot of land in Georgetown, and, on that day, by deed, leased it to Alexander Kile, for ninety-nine years, renewable forever, at the yearly rent of \$90, and taxes, payable on the last of March, with the usual covenants. That on the 9th of May, 1812, Kile being in possession, assigned his lease to James Redman, who entered, and was possessed till his death, when his administrator entered, and continued in possession to the present time, and paid the rent to the 31st of March, 1827, but nothing since. That the testator, Beall, having made his will on the 6th of January, 1820, died shortly after, without revoking or altering the same. That the plaintiff is the sole surviving executor. That Anne Beall, the widow of the testator, died on the 28th of November, 1827. That the heirs at law of the testator, if any, are aliens, and are unknown to the parties. That the widow, Anne Beall, died indebted to several persons, for board, medical attendance, and other necessities.

It is submitted to the Court to say, whether the plaintiff, William Hardy, is entitled to receive the rents due on the said premises, since the 31st of March, 1827, either in whole or in part. Judgment to be entered for the plaintiff, for so much as the Court may think him entitled to receive, if entitled to receive any part; but, if no part, judgment to be for the defendant.

Mr. Marbury, for the plaintiff, contended :

1. That the assignee was bound by the covenant to pay the rent.

2. That it was a devise to the executors in fee.

When a trustee is to receive the rents and profits, he has the legal estate. The power to sell vests the fee in the trustee, and he becomes trustee for those in reversion. It cannot be an estate for the life of the trustee, for the widow might outlive him. It cannot be for her life, because the power is to sell, and invest the proceeds in stocks, to raise a fund for the support of the widow. No interest vested in the trustee; but he has, at least, a life estate, because, having accepted the trust, he was bound to support her, whether the annual rents and profits would or would not be sufficient for that purpose, and, therefore, might be subjected to loss if the estate were only for the life of the widow. Cruise, Dig. tit. Devise, c. 1, § 13, 18, 24, 26; 6 Co. 16 a.

Mr. C. Cox, contra. No greater estate vested in the executors than was necessary to enable them to execute the trust. They

were not bound to advance money, or to make contracts. 2 Roberts on Wills, 26; 6 Cruise, 315, 316; Co. Lit. 42 a; *Mercer v. Blackmore*, 2 Atk. 341; Roberts on Wills, 446, 447, in notes; *Redin v. Rowstone*, 2 Lord Raym. 829; Cro. Eliz. 919.

CRANCH, C. J., delivered the opinion of the Court.

The defendant's counsel contends, that this is a devise to the executors in trust for the use of Mrs. Beall during her life, with remainder to the heirs of the testator, and that the use is vested by the statute of uses; so that it is, in effect, a devise to her for life, and that the heirs of the testator take the reversion by descent, and do not take a remainder by purchase; or, at most, that the executors only take an estate during the life of the widow, and that the reversion descended to the heirs at law; for the words, "the remainder of my estate to devolve on my heirs at law," give them no other estate than the law would give them; in which case it is settled, that the heir shall take by descent, and not by purchase. That, where the devise is charged with the payment of a gross sum, it carries a fee; but where the sum is to be paid out of the annual rents and profits, it is only an estate for life. And that, where lands are subjected to a temporary right of possession in another, subject thereto, the heir takes by descent.

These principles are correct, but they do not apply to this case. This is not a devise in trust directly to the use of the widow, nor to suffer her to take the rents and profits, in which case, perhaps, the statute would execute the use; but it is a devise to the executors, charged with the payment of debts and funeral expenses; and that the proceeds of the estate should be applied to the support of the widow, in such manner as they should think proper, and with power to sell the estate, if the rents and income should not be found sufficient to support the widow and pay the debts.

In the case of *Gibson v. Montfort*, (1 Vesey, 490, 491,) the testator devised his real and personal estate to trustees, and their executors, administrators, and assigns, in trust, to and for several uses, to pay several annuities, sums, and legacies, by and out of the produce of the personal estate; if that should be deficient, then out of the rents, issues, and profits of the real estate. Lord Hardwicke decided that the whole legal estate of inheritance was devised to the trustees, and said — "It has often been decided that, in a devise to trustees, it is not necessary that the word 'heirs' should be inserted, to carry the fee, at law; for if the purposes of the trust cannot be satisfied without having a fee, courts of law will so construe it, as in *Shaw*, and

Sanderson's Case.

Wright, and several other cases, (1 Eq. Cas. Ab. 176.) Here are purposes to be answered, which, by possibility, (and that is sufficient,) cannot be answered without the trustee's having a fee, namely, the payment of several annuities, and large pecuniary legacies. If the personal estate is deficient, which will probably be the case, then how is the rest to be raised? Barely by the annual rents and profits. It must be so if it is a chattel interest, for then it cannot be taken out of the estate by anticipation; but that cannot be here, for if these pecuniary legacies be not paid out of the personal, the real estate must be sold to satisfy them. For several of them are to be paid within a year after the testator's death, and cannot, therefore, be paid by annual perception. This, then, is a purpose which it is impossible to serve, unless the trustees have the inheritance, for if they are to sell a fee they must have a fee; nor will the court split the devise."

That case seems to be decisive of the present; for here the executors have not merely an implied but an express power given to them, by the will, to sell the real estate, for the payment of the debts and the support of the widow.

We, therefore, are of opinion that the plaintiff, William Hardy, has an estate in fee in the reversion of the lot, in trust for the heirs at law of Samuel Beall, or for such persons as would, but for their alienage, be his heirs at law; and, consequently, that the plaintiff is entitled to receive the whole rents up to the time of the commencement of this suit, or to the last pay-day preceding such commencement. (See Cruise's Dig. tit. Devise, c. 10, § 29, 30, 31, 32, 36; and c. 11, § 49 - 73.)

SANDERSON'S CASE.

A witness is not bound to answer, before the grand jury, to a question, the answer to which might implicate himself; and he is the sole judge whether it will. The Court is to decide whether the answer could implicate the witness.

MEMORANDUM. August 6, 1829. The foreman of the grand jury came down, and stated that a Mr. Sanderson had refused to answer who was the author of a certain publication in "The Baltimore Republican," supposed to reflect upon the Court and Jury, in the trial of the cases of *The United States v. Watkins*, although he said it was "confessedly" written in this district; and that he said he could not answer the question without implicating himself.

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The COURT (THRUSTON, J., absent,) said, that it seemed to the Court that he might be implicated by answering the question, and he was the sole judge whether it would ; and, if it would, he was not bound to answer the question.

MORSELL, J., was not clear that it could implicate him.

CRANCH, C. J., thought that it might form a link in the chain of circumstances, leading to a prosecution against himself, as the publisher of the paper ; for, although the paper was printed in Baltimore, it might have been published here. At least it is questionable, whether sending a paper here would not be a publication here ; and, as the witness was now here, he might possibly be prosecuted here.

He was not compelled to answer.

MCCUE v. THE CORPORATION OF WASHINGTON.

The managers of "The Lottery for building Lancastrian School-houses, a Penitentiary, and City Hall, in Washington City," had no authority to sell quarters of tickets, so as to multiply causes of action against the corporation.

The holder of a prize ticket cannot, without the consent of the corporation, maintain an action against the managers upon their bond to the corporation ; who may order the suit to be dismissed.

Upon a general demurrer, the judgment must be against him who commits the first substantial fault in the pleadings.

A special demurrer operates as a general demurrer, as to all the pleadings of the party demurring.

A rejoinder is bad, which avers several distinct answers to the replication, or puts in issue to the jury matter of law.

The fact, that the plaintiff brought an action, in the name of the Corporation of Washington, against the managers, upon their bond, to recover one fourth part of the prize drawn upon or by the ticket No. 1037, which action was dismissed by the corporation, after it had been pending three years in court, is no bar to the plea of the act of limitations.

The Corporation of Washington were not liable to the holder of a quarter of a ticket, suing alone.

A general demurrer to the declaration must be overruled if it contain one good count, although it contain also three bad counts.

ASSUMPSIT, for one fourth part of the prize of \$10,000, drawn upon ticket No. 1037, in the first class of a lottery called "The National Lottery."

The declaration contained four counts :

1. The first count sets forth the amended charter of the city of Washington, of May 4, 1812 ; the by-law of July 24, 1815 ; the managers' bonds ; the scheme of the lottery, first class, 19th December, 1817 ; that the managers issued and exposed to sale the ticket No. 1037, by which the defendants promised to pay to the possessor thereof such prize as might be drawn to the said

number, if demanded within twelve months, &c., subject to a deduction of fifteen per cent. &c.; that the plaintiff, on the 1st of July, 1818, "for a full and valuable consideration paid by him, became the purchaser and lawful possessor of one fourth part, or quarter share, of the said last mentioned ticket." That the drawing of the said lottery was finished July 21, 1819, and that the said ticket, No. 1037, was drawn to a prize of \$10,000; "by means whereof the plaintiff became entitled to have and demand of the said defendants the one fourth part of the said \$10,000, subject," &c.; "and the plaintiff, being so entitled, on the 1st of October, 1819, demanded of the defendants payment of the said quarter share, or fourth part of the said prize; by means whereof the defendants became liable and bound to pay to the plaintiff the said quarter part of the said \$10,000, subject," &c., "according to the tenor and effect of the said ticket; and, being so liable, in consideration thereof, afterwards," &c., "undertook and promised the plaintiff to pay him the said last-mentioned sum of money," &c.

2. The second count was like the first, except that it did not set forth the charter and by-law at large, and did not mention the bonds of the managers.

3. The third count, after stating the lottery, and that the defendants, by their managers, issued and offered for sale the ticket No. 1037, says that the plaintiff, on the 1st of July, 1818, became the lawful owner and possessor of one fourth part, or quarter share of the said ticket, No. 1037, which, in the course of the drawing, which terminated on the 21st of July, 1819, drew \$10,000; and, on the 1st of October, 1819, the plaintiff demanded of the defendants payment of the said fourth part of the said prize, "by means whereof the defendants became liable," &c. &c.

4. The fourth count is for money had and received.

To this declaration the defendants pleaded:

1. *Non assumpserunt.*

2. *Non assumpserunt infra tres annos.*

3. *Actio non accrevit infra tres annos.*

Upon the first plea, the issue was joined.

To the pleas of limitation, the plaintiff, in his replication, says that he ought not to be precluded from having his action, because he says, "That the defendants standing in the relation of trustees for the benefit of the fortunate adventurers in the said lottery, and for the purpose of insuring the payment of such prizes as they should draw therein, took bonds from the said managers respectively, each in the penal sum of \$10,000, to be paid to the said defendants, if the said managers should

not diligently and impartially exercise and perform the duties and authority vested in them by the said ordinance of the 24th of July, 1815; and that afterwards, when the said lottery had been fully drawn, and the said plaintiff had demanded of the said managers the payment of the said prize so as aforesaid drawn by him, and the said managers had refused to pay the same, or any part thereof; and when the plaintiff had obtained from the register of the said corporation of the city of Washington, who had the lawful custody thereof, copies of the said bonds taken as aforesaid from the said managers, and instituted suits thereon in the name of the said defendants, for the use of the said plaintiff against the said managers, (without any objection made thereto by the said defendants,) for the recovery of his share of the said prize so as aforesaid drawn; and when the said plaintiff had prosecuted the said suit in the Circuit Court of the United States for the District of Columbia, and for the county of Washington, and in the Supreme Court of the United States by writ of error; and when, by mandate from the said supreme court to the said circuit court, the said plaintiff was about to receive the benefit of the said suit by obtaining a judgment against the said managers for his share of the said prize, they, the said defendants, in violation of their duty, and in utter disregard of the trust so reposed in them by every law of decent morality, and by the fair intendment of the said Act of Congress, did then, that is to say, on the 1st of January, 1825, at the county aforesaid, by virtue of their authority, as plaintiffs at law, (the suit being in their name as plaintiffs,) cause the said suits to be dismissed, whereby the said plaintiff was unjustly and oppressively deprived of all benefit derivable from the said suits; and this the said plaintiff is ready to verify, whereupon he prays judgment," &c.

To this replication the defendants rejoined as follows: "and the said defendants pray oyer of the copy of the bond and condition thereof, in the said replication mentioned; and it is read to them as follows, to wit," &c. They also "pray oyer of the record and process of the said suit in this Court; and of the said mandate from the said supreme court in the said replication mentioned, and the same are read to them as follows," &c.

"All which being read and heard, the defendants say, that the plaintiff ought not to have or maintain his action aforesaid against them, by reason of any thing by him above pleaded or alleged by way of replication to the second and third pleas of the said defendants," because they say that they did not take the "said bonds as trustees for the said plaintiff, or other of the fortunate adventurers in the said replication mentioned; nor was

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the said suit in the said replication mentioned, commenced or prosecuted by the said defendants, or with their assent or authority, for the use of the said plaintiff against the said managers; nor was the plaintiff about to recover any judgment in the said suit, against the said managers in virtue of the said mandate or otherwise; nor did the defendants, in fraud or violation of their said pretended trust, cause the said suit to be dismissed; nor did the defendants, at any time, within three years next before the commencement of this suit, make any such promise or assumption as in the said declaration is alleged; nor did the plaintiff's cause of action aforesaid arise, or in any manner accrue at any time within the said three years, in manner and form as the plaintiff, in his said replication to the said second and third pleas of the defendants, has above pleaded and alleged, and of this he puts himself upon the country."

To this rejoinder the plaintiff demurred; and stated for cause of demurrer, that the defendants have thereby tendered an issue to the country; which issue is not responsive to the said replication; and is an immaterial issue.

The case was argued on the 23d of June, 1829, by *Mr. Ashton* and *Mr. Key*, for the plaintiff, and by *Mr. Wallach* and *Mr. Jones*, for the defendants.

CRANCH, C. J., delivered the opinion of the Court; (THRUSTON, J. not sitting in this cause.)

Upon a general demurrer the judgment must be against the party who commits the first substantial fault in pleading.

The demurrer, in this case, is special only so far as regards the rejoinder, which avers so many distinct answers to the replication, involving several negatives pregnant, and putting in issue to the jury, matters of law mingled with allegations not responsive to the replication, as to make it a bad rejoinder.

But the replication itself is not a sufficient legal justification for not bringing the suit within three years. It confesses and attempts to avoid the plea of the statute of limitations, by showing that the plaintiff instituted suits in the name of the defendants, (without any objection by them,) against the managers, whereby the three years were expended, when the defendants, by virtue of their authority as legal plaintiffs, dismissed the suits.

This is certainly no legal bar to the operation of the act of limitations. The Supreme Court of the United States, in the case of *The Corporation of Washington v. Young*, 10 Wheat. 406, upon the same ticket No. 1037, decided that the holders of the ticket had no right to use the name of the corporation, and sue upon the manager's bond, without the consent of the corporation, and that no consent appeared to be given in that case;

and it was upon the return of that cause to this Court, by mandate, after having reversed the judgment and set aside all the pleadings up to the declaration that the plaintiffs in that cause (the now defendants) caused the suits to be dismissed as mentioned in the replication. The replication, therefore, cannot be maintained.

The pleas are good ; but the first three counts of the declaration are not sufficient to support the action, because they do not state of whom the one fourth of the ticket was purchased ; and because the defendants are not liable for a quarter ticket, suing alone ; the only obligation of the corporation being upon the contract contained in the whole ticket, signed by their managers, as was decided in this Court, in *Shankland's case*, at May term, 1828, (*ante*, 328.)

The fourth count, however, for money had and received, is a good count, and, therefore, the judgment upon the demurrer cannot be for the defendant, although the first three counts are insufficient, because the plaintiff's special demurrer to the defendant's rejoinder, is special as to that rejoinder only, but operates as a general demurrer to the whole declaration ; and upon a general demurrer to the whole declaration, if there be one good count, the demurrer must be overruled.

But the plaintiff's replication to the second and third pleas, being insufficient to support his action, the judgment upon this demurrer must be for the defendants.

It was stated by the plaintiff's counsel, in the course of the argument in this cause, that it was the wish of the parties, that the Court should decide the merits of the case upon this demurrer ; and that they would ask leave to amend the declaration if the Court should be of opinion that, by any such amendment as could be made consistently with the facts which appeared on the trial of the former cases, namely, *The Corporation of Washington v. Young*, (2 Cranch, C. C. 632) ; *Brent v. Davis*, (Ib.) ; *Clark v. The Corporation of Washington*, (2 Cranch, C. C. 502) ; and *Shankland v. The Corporation of Washington*, (*ante*, 328,) the plaintiff would be entitled to recover.

The Court has looked into those cases, and finds that although Davis, who sold to the plaintiff this quarter of a ticket, and Gillespie, who sold the ticket to Clark, must, under the decision of the supreme court in Clark's case, be considered as the agents of the corporation for the sale of tickets, yet, that they had no right to sell less than a whole ticket, or to sell a fractional part of a ticket, so as to multiply the causes of action against the corporation at their pleasure.

In the plaintiff's printed statement of the case for the supreme

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court, in the case of *The Corporation of Washington, for the use of Blake v. Young*, in p. 12, 13, it is said that the original ticket, No. 1037, was never in the possession of the parties for whose use the suit was brought; but was retained by Gideon Davis, who sold four quarters of the said ticket, each quarter being in the terms following: "By authority of Congress, \$30,000 highest prize, quarter of No. 1037, in the lottery for building Lancastrian school-houses, a Penitentiary, and City Hall, in Washington city, payable sixty days after the completion of the drawing.

GIDEON DAVIS, 4th."

And in page 11, it is stated, "that the said Gideon Davis, since the completion of the drawing of the said lottery, and before the bringing of this suit, delivered to the said managers the said original ticket, No. 1037, towards the securing and paying of the money stipulated to be paid by him, under the contract recited and set forth in the said condition," that is, of Davis's bond to the managers.

The ticket had been sold and delivered by the managers to the said Davis, under that contract.

It will be perceived that the certificate given by Davis for the quarter of the ticket, appears to be his own individual act. It does not name the managers, nor allude, in any manner, to the authority or responsibility of the Corporation of Washington. We think, therefore, that it must be considered as his personal engagement only, and that it cannot, in any manner, bind the corporation. The judgment upon this demurrer must, therefore, be for the defendants.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1829, AT ALEXANDRIA.

UNITED STATES *v.* JOHN HOLLINSBERRY.

The Court will, on motion, quash an indictment for assault and battery, in Alexandria, if the name of a prosecutor be not written at the foot thereof, although the accused shall have been recognized to appear at the Court to answer for the offence.

INDICTMENT for assault and battery upon Robert Walker. No prosecutor's name was written upon the indictment.

Mr. Taylor, for the defendant, moved the Court to quash the indictment for that reason, which was done, (MORSELL, J., absent,) upon the authority of *United States v. Hellrigle*, at November term, 1827, [*ante*, 179,] and *United States v. Shackelford*, at April term, 1828, [*ante*, 287,] although the defendant had been recognized by a justice of the peace to appear at this term to answer for the offence.

Mr. Swann, for the United States, then offered the witnesses to be examined by the Court, and prayed the Court to order an indictment to be sent up to the grand jury. The Court examined them, but refused to order an indictment.

Mr. Swann objected to the cross-examination of the witnesses by the defendant; but the Court overruled the objection.

See also *United States v. B. Dulany*, at December term, 1808, (1 Cranch, C. C. 510); and *United States v. Sandford*, 14th July, 1806, (Ib. 323); *Commonwealth v. Leap*, April, 1801, (Ib. 1); *United States v. R. B. Jameson*, January, 1802, (Ib. 62); *United States v. Singleton*, June, 1805, (Ib. 237); *United States v. Carr*, November, 1823, (2 Ib. 439); *United States v. Willis*, November, 1808, (1 Ib. 511.)

TRIPLETT AND NEALE v. BANK OF WASHINGTON.

A call for all the letter-books of the bank from its institution to the time when the cause of action arose, was held to be too general. The Court will compel the production of such only as they are satisfied contain evidence pertinent to the issue. The party calling for books has no right to examine them before the trial, to see whether there be not something in them pertinent to the issue.

UPON the *venire de novo* issued under the mandate of the Supreme Court, in this case, (see 1 Peters, 36,) the plaintiffs had given notice to the bank (the defendant,) to produce at the trial the letter-books of the bank, from its institution down to the year 1825, to be used in evidence. The COURT (MORSELL, J., absent,¹) said that the call was too general, and that the bank ought not to be compelled to produce them unless the plaintiffs should first satisfy the Court that they contained evidence pertinent to the issue; and then they could be compelled to produce only such as they show to be pertinent.

Mr. Neale contended that he had a right to examine them before the trial, to see whether there were not something in them pertinent to the issue.

But the Court said he had no such right. The plaintiffs then gave notice to the defendants to produce, at the trial, the letter-books of the bank which contain their letters to their dealers, notifying them of the acceptance or non-acceptance of such drafts, payable after date, as have been sent to the bank for collection; and also such letter-books as contain their letters notifying their dealers that individuals had not been found by the officers of the bank on whom drafts had been drawn payable after date, and sent to the bank for collection; and moved the Court to order the defendants to produce those books.

Mr. Key, for the defendants, objected that the notice was still too general. It does not show that there are any such letters. It is merely to enable the plaintiffs to find possible evidence.

The COURT refused to make the order; not being satisfied that the books contained any matter pertinent to the issue, (no particular letter being designated,) and not being of opinion that the plaintiff has a right to inspect the books for the purpose of ascertaining whether they contained any such matter.

The cause was tried. Verdict for defendant. Exceptions taken to the rejection of evidence, but no important point of law decided by the Court.

¹ On account of the death of his brother.

BENNETT'S EXECUTORS v. JAMES H. BENNETT.

A notice given at the trial term, in Alexandria, that security for costs will be required, is no ground for postponing the trial.

Mr. Neale, for the defendant, now, at the trial term, gave notice to the plaintiff that he should require security for costs.

Mr. Taylor objected that this notice ought not to delay the trial; the defendant having obtained continuances of the cause, and not having given a previous notice, according to the act of Virginia, p. 111, § 23.

Mr. Lee, the clerk, stated that the practice of the Court was not to delay trial when the notice was not given before the trial term.

The COURT (*nem. con.*) refused to delay the trial. Verdict for the defendant.

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 JESSE SCOTT'S EXECUTOR v. COLIN AULD.

The owner of a female slave sold her, without reserving any reversionary right, and took a covenant from the vendee that he would set her free after twelve years' service; nothing being said of her increase in the mean time; — Held, that parol evidence of the declarations of the vendor that he had sold the slave for her full value as a slave for life, could not be admitted to be given by the defendant; and that the written evidence purported that the vendor had parted with his whole right in the slave to the vendee, and that the vendor was not entitled to the issue born after the sale.

DETINUE, for three negroes who were born while Hannah, their mother, was in the possession of James Anderson, under the following instrument:

“ Alexandria, March 1, 1816.

“ I have this bo't of Mr. Jessey Scott, Hannah and her sonn John; Hannah to serve twelve years, and John untill he is thirty-five years old, and then both to be free; for the faithful performance of which I bind myself, my heirs, &c.

“ Test, Jas. W. Scott.”

“ JAS. ANDERSON.”

Upon the trial, *Mr. Mason*, for the defendant, offered parol evidence of the declarations of Scott, that he had sold Hannah and John for their full value as slaves for life; and that Anderson was to set them free, and that nothing was said by Scott respecting the issue born during the twelve years.

Mr. Wise, on the same side, cited 1 Phil. on Ev. 476, and *Peisch v. Dickson*, 1 Mason, Rep. 10, and *Livingston v. Ten Broeck*, 16 Johns. Rep. 14. This suit was brought after the expiration of the twelve years.

Mason v. Mason.

Mr. Taylor, for the plaintiff, objected, and
The COURT (*nem. con.*) rejected the parol evidence.

A verdict was taken for the plaintiff, subject to the opinion of the Court upon the case as it appears above stated.

Mr. Taylor and *Mr. Hewitt*, for the plaintiff, contended that there was a reversion in Scott, the vendor, and that the children of Hannah, born during the twelve years' servitude, were his slaves. *Negro Maria v. Serbaugh*, 2 Rand. 228.

The COURT (MORSELL, J., *contra*.) was of opinion that Scott parted with his whole right in the slaves Hannah and John, to Anderson, who contracted with Scott to emancipate them when they should have served out the respective terms stipulated, &c.
Judgment of nonsuit to be entered.

THOMPSON F. MASON v. RICHARD B. MASON.

The plaintiff indorsed a note (as town-indorser,) already indorsed by two others, for the accommodation of the maker, and at maturity was obliged to take it up. Held, that he may recover of the first indorser the whole amount paid to take up the note.

ASSUMPSIT by the last indorser against the first indorser of a promissory note made by T. Mason, payable to and indorsed by the defendant, Richard B. Mason, and by H. Ashton. The note was offered for discount, but the bank required a town indorser, and the plaintiff, who resided in Alexandria, indorsed it. It was then discounted for the benefit of the maker, and, at maturity, paid by the plaintiff.

The defendant contended, that as he and Mr. Ashton indorsed it for the accommodation of the maker, he was only liable for one half; but

The COURT, (*nem. con.*) at the prayer of the plaintiff, instructed the jury that the defendant was liable for the whole amount paid by the plaintiff to take up the note.

THRUSTON, J., and MORSELL, J., were of opinion that this case differs from that of *McDonald and Magruder* at Washington, in this particular, that here the plaintiff was not originally one of the indorsers before the note was offered for discount.

CRANCH, C. J., did not think that that circumstance was material, because he was of opinion that the prior indorser was liable to the subsequent, for the whole, unless there be an agreement to the contrary.

BANK OF ALEXANDRIA v. JOHN MCCREA.

The cashier of a bank is a competent witness to prove that the defendant has overdrawn his account.

Payment of a check is *primâ facie* evidence of funds.

ASSUMPSIT, for money overdrawn.

Mr. Swann, for the defendant, objected to the testimony of *Mr. McKenna*, the cashier of the bank, because he would be liable if he received the money and did not credit it.

The COURT, however, (*nem. con.*) overruled the objection; because it was not attempted to be shown that the money was paid to him; and because, if it was paid to him, and he had not credited it, he would be liable to the defendant, or to the bank.

The COURT also said, that they had decided at Washington, in *Bank of the United States v. Wilson*, ante, 213, that the payment of a check by the bank was *primâ facie* evidence of funds in bank to the amount of the check.



JOHN HARRIS, Appellant, v. WILLIAM B. NUGENT, Appellee.

The maritime law does not apply to such boats as the Tyber steamboat, a ferry-boat running between Washington and Alexandria.

The master of such a boat is not personally liable for the wages of the hands.

APPEAL from the judgment of a justice of the peace, for the wages of Nugent, on board "The Tyber" steamboat, a ferry-boat, or packet, running between Washington and Alexandria. Nugent was the plaintiff below. The evidence which he relied upon was the following paper:

"Shipped W. A. B. Nugent, May 6, 1829, on board the Tyber steamboat, at twenty-two dollars per month. For the steamboat Tyber, John Harris."

And parol evidence that Harris was the master of the boat; but had been dismissed before suit brought.

The justice had given judgment only for the amount of wages up to the time when the master was dismissed.

The COURT (*nem. con.*) reversed the judgment; being of opinion that it was not a personal engagement by Harris, and that the maritime law did not apply to such boats, so employed.

Studer v. Glenn.

GULICK'S EXECUTORS v. McIVER, Assignee of Watson, a Bankrupt.

An assignee under the Bankrupt law of 1800 cannot deny the authority of the commissioners under whom he received the property of the bankrupt.

THIS suit was brought to recover a dividend of the property of Josiah Watson, a bankrupt, which had been declared by the commissioners.

The defendant demurred to the evidence; which, among other things, stated that Jonah Thompson, one of the commissioners under the Bankrupt Act of 1800, who declared the dividends, was himself a creditor of Watson.

Mr. Swann, for the defendant, contended that *Mr. Thompson* was incompetent to act as a commissioner, by reason of his interest.

Mr. Taylor, contra. *Mr. McIver* cannot deny the authority of the commissioners under whom he has received the property of the bankrupt. He claims to hold under their assignment.

The COURT (*nem. con.*) rendered judgment for the plaintiff on the demurrer.

ROTCHFORD v. MEADE.

In replevin, several counts cannot be joined in the cognizance.

REPLEVIN. The defendant made cognizance in three counts : 1st. As bailiff of Scholfield, attorney of Harper ; 2d. As bailiff of Harper ; and, 3d. As bailiff of Scholfield, upon his own seizin.

The plaintiff demurred specially to the cognizance, for duplicity.

The Virginia statute only gives to plaintiffs in replevin the right to plead double ; not to the defendants.

The COURT (*nem. con.*) was of opinion that several counts cannot be joined, in cognizance in replevin ; and especially claims in different rights, which could not be joined in a declaration.

Judgment for the plaintiff on the demurrer.

MORRIS STUDER v. GLENN.

The father, with the consent of his son, fifteen years old, bound him to Glenn, as an apprentice. The son signed and sealed the indentures, but was not named as a

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party therein, nor was there any covenant on his part. The Court refused to discharge him.

Mr. Hewitt had obtained a rule on the defendant, to show cause why *Morris Studer* should not be discharged from the service of the defendant, as an apprentice; at the return of which rule, he contended that the indenture was void, because there was no covenant on the part of the son. That the father could not bind him without his consent; and his signing and sealing the indentures, which contained no covenant on his part, was no evidence of his consent. The law of Virginia requires that he should be taught reading and writing; but, by these indentures, he is only to be taught ciphering. *The King v. Inhabitants of Arnesley*, 3 Barn. & Ald. 584; *Mary Highton's case*, 8 East, 25; *Dowle's case*, 8 Johnson, 328.

The COURT (*nem. con.*, but CRANCH, C. J., doubting,) refused to discharge the apprentice, he having been fifteen years old at the date of the indentures, and having signed and sealed them, although they contain no covenant on his part.

 FAIRBURN WALSH v. RICHARD WALSH'S ADMINISTRATOR.

The Orphans' Court is not bound to receive, as evidence, the testimony taken under a commission, not issued by consent of the parties, and not directed to commissioners mutually named by the parties; but directed to any notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere; and not issued in conformity with any established practice or rule of the Orphans' Court.

The Orphans' Court may adopt the practice of the Court of Chancery, as to the manner of issuing commissions, or it may establish rules of practice for itself in this respect.

APPEAL from an order of the Orphans' Court, which rejected certain depositions which had been taken under a commission issued by that court, without the consent of the parties, and directed to any "notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere." (See the Act of Virginia of November 29, 1792, p. 279, § 13.)

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

By the Testamentary Law, c. 15, § 12, "The Orphans' Court shall have full power, authority, and jurisdiction to examine, hear, and decree upon all accounts, claims, and demands, between persons entitled to any distributable part of an intestate estate," "and administrators."

This is such a claim and demand, and the jurisdiction is expressly given; and that court must, *ex necessitate*, ascertain

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the fact, that the party claiming is entitled to a distributable part of the estate. To do this, it must have the power of obtaining the testimony of witnesses not residing within its territorial jurisdiction. This may be done by commission, in analogy to the practice in courts of chancery, to which tribunal the Orphans' Court is referred, (in the same section of the act,) for the extent of its power, and the means to enforce its decrees.

The Orphans' Court may adopt the practice of courts of chancery, as to the manner of issuing its commission; or it may establish rules of practice for itself in this respect. If it has no rule upon the subject, a commission issued according to the practice in chancery would be unexceptionable; but it is not bound to receive testimony not taken according to its own rules, nor according to the rules of any other court.

The commission which was issued in this cause was not issued by consent of the respondent, and was not directed to commissioners mutually named by the parties; but is directed to any notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere. It is not issued in conformity with any established practice or rule of the Orphans' Court, or of any other court in this district; and the Orphans' Court was not bound to receive, as evidence, the testimony taken under it. The order of that court, therefore, "that this cause stand over, in order that a new commission may be awarded, and depositions taken, if desired by the complainant; otherwise, that the same be dismissed at the proper costs of the complainant," is hereby affirmed with costs; and the cause is remanded to the Orphans' Court for further proceedings.¹

¹ In the Deputy Commissary's Guide, p. 213, is the form of a commission for taking testimony, used by the Prerogative Court for Probate of Wills, in Maryland. It is issued in the name of the Lord Proprietary to four persons, by name, authorizing them, or any three or two of them, to examine witnesses for plaintiff and defendant, on their corporal oaths, to be administered by the commissioners on the holy Evangelists of Almighty God, &c. To which commission was annexed the form of the oath to be taken by the commissioners.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1829, AT WASHINGTON.

THE CORPORATION OF WASHINGTON *v.* L. K. TOWNSEND.

No penalty was prescribed by the by-law of 19th July, 1804, against hawkers and pedlars, for not taking out a license. The by-law is not correctly stated in Burch's Digest, p. 102.

THIS was an appeal from the judgment of a justice of the peace, who had *non prossed* the corporation, upon a warrant for \$20 fine for not taking out a hawker's and pedlar's license, under the 9th section of the by-law of July 19, 1804, entitled, "An act requiring annual licenses to be taken out by ordinary or tavern keepers, retailers, and hawkers or pedlars."

The first and second sections relate to tavern-keepers, requiring them to take out license, and give bond with two sureties. The third, fourth, and fifth sections require retailers of wines, and spirituous liquors also to take out license, and give bond with sureties. The sixth section requires the register, on the direction of the mayor, to make out the licenses. The seventh exempts those whose licenses have not expired from taking a new license until their old ones have expired.

Then comes the eighth section: in these words, "And be it enacted, that for every infraction of the provisions of this act, there shall be paid, by the person committing the same, or his sureties, the sum of twenty dollars."

It is then enacted by the ninth section, "That persons usually denominated hawkers and pedlars, carrying goods, wares, and merchandise from place to place in the city, shall take out annual license therefor, for which shall be paid \$35 each license; and the said hawkers and pedlars shall be bound to exhibit to any officer of the corporation, at all times when thereto required or demanded, the license obtained as aforesaid." The tenth section makes it the duty of the register to grant licenses in the absence of the mayor; and the eleventh section repeals so much of former acts as comes within the purview of this.

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Mr. Burch, in his Digest, p. 102, has inserted these words: "That if any hawker or pedlar shall be found selling as aforesaid, without a license, or shall refuse or fail to show his license when required so to do, he shall, for every day he shall be found so selling, or for every refusal or failure as aforesaid, forfeit and pay the sum of \$20." (Act 19th July, 1804.) No such provision has been found in that or any other act of the corporation.

The Court affirmed the judgment with costs.

DOLLY ANN PATTEN v. CORPORATION OF WASHINGTON.

A justice of the peace in the city of Washington has authority, under the charter of May 4, 1812, and the by-law of the 16th of December, 1812, section 7, to require a common prostitute to give security for her good behavior; and has jurisdiction of a suit upon the bond given therefor; the penalty not exceeding \$20.

APPEAL from the judgment of Mr. Justice Wharton, for \$20, the penalty of a bond heretofore taken by him from Dolly Ann Patten, a notorious common prostitute, and keeper of a brothel, under the seventh section of the by-law of the corporation of Washington, of December 16, 1812.

Judgment affirmed with costs.

NEGRO WILLIAM SMITH v. DANIEL PARKER.

A promissory note of an emancipated slave given to his master, after emancipation and in consideration of his emancipation, is valid.

APPEAL from the judgment of a justice of the peace, for \$50, upon a note given by the appellant to the appellee in consideration of his emancipation by the latter. The note was given immediately upon the execution and delivery of the deed of emancipation, and bears date the same day.

Mr. Worthington, for the appellant, contended that the note was *nudum pactum*. The consideration was entirely past when the note was given. The slave, while a slave, was incompetent to contract, and after emancipation there was no consideration for the note. The case of *Contee v. Garner*, in this Court at December term, 1818, (2 Cranch, C. C. 162,) was debt upon a bond given by a slave to his master for the price of his emancipation: The suit was brought after he was emancipated. The defendant pleaded a special *non est factum*, namely, that when he signed, sealed, and delivered the instrument, he was a slave; and

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so it was not his deed. Issue being joined upon that plea, and the Court being of opinion that a slave could not bind himself at law to pay money to his master, even for his freedom, the plaintiff became *non pros*.

Mr. Z. C. Lee, contra, cited 1 Bl. Com. 127, 425; *Williams v. Brown*, 3 B. & P. 72, in which *Heath, J.*, said, "In all countries where slavery is tolerated, agreements between the master and the slave respecting the manumission of the latter, are enforced by the law. Suppose the slave, after having obtained his manumission, should refuse to perform his part of the contract, there is no country where such conduct would be endured. He is competent to enter into a contract for the purpose of his manumission, and therefore such contract may be put in force against him."

And *Chambre, J.*, said, "But I do not know that a slave is precluded from entering into a contract. He may do so, provided his contract do not affect the rights of his master. Though he cannot deprive his master of his services, yet with the consent of his master, he may engage to do service for another."

Mr. Worthington, in reply, cited *Come v. Clement*, 6 Binney, 211; *Powell on Contracts*, 348; and *Wennall v. Adney*, 3 B. & P. 249, note.

The Court affirmed the judgment, with costs, (CRANCH, C. J., doubting.)

MICHAEL SARDO, Appellant, v. LEWIS FONGERES, Appellee.

Money won at billiards is money won at play, within the 5th section of 9 Anne. c. 14, and cannot be recovered if more than £10 be won at one time; which section of that statute is in force in the county of Washington.

APPEAL from the judgment of a justice of the peace for \$50, of which \$48 were won at billiards at one time, and \$2 were for the use of the billiard-table, the plaintiff below being the owner of the table.

Mr Marbury, for the appellant, contended that the debt was void by the 5th section of the English statute of 9 Anne, c. 14, which was in force in Maryland, on the 27th February, 1801, and adopted as a part of the law of Maryland, as they then existed; the amount won at one time being more than £10. 1 Comyn on Cont. 41.

Mr. Wallach, and *Mr. Elkins*, for the appellee, contended that, as the Maryland act of 1797, c. 110, respecting gaming-tables, excepted billiard-tables, all gaming at billiards was lawful; and that money won at billiards was not within the English Statute

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of 9 Anne, c. 14; and they cited — v. *Bland*, 3 Burrow, and 5 Burr. 2802, and the Maryland act of 1797, c. 110.

The COURT, (THRUSTON, J., absent,) reversed the judgment, with costs of this Court, and entered judgment for the appellee for \$1, for the use of the table, he being the owner thereof.

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The authority given to the corporation of Washington, by their charter of 1804, is “to restrain or prohibit,” “all kinds of gaming.” The by-law of the 16th of August, 1809, prohibiting the setting up or keeping any faro-table, &c. within the city of Washington; and a conviction under that by-law, are no bar to an indictment against the same person for a nuisance at common law by keeping a common gambling house at the same time.

INDICTMENT at common law for keeping a common gaming house, and procuring divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game called faro, for divers large and excessive sums of money; to the great damage and common nuisance of the good citizens of the United States, to the evil example, &c.

Verdict guilty, subject to the opinion of the Court upon the fact that the defendant has been convicted and fined, by a justice of the peace, under the by-law of the corporation of Washington, of the 16th of August, 1809, for keeping a faro-table in the same place, and for the same time, whether such conviction is a bar to this prosecution. By that by-law it was enacted, that “no E O, A B C, L S D, faro, roly-bolly, shuffle-board, equality-table, or other device to be used with cards, balls, dice, coin or money, except billiard-tables, for the purpose of playing, or gaming for money, or any thing in lieu thereof, shall be set up or kept in any part of this city, under the penalty of \$20, for every day or less time,” &c. “to be recovered of the person so setting up or keeping the same, before a single magistrate, one half whereof shall go to the informer, and the other for the use of the city council.”

Among the powers given to the corporation by the Act of Congress, (2 Stat. at Large, 254,) of the 24th of February, 1804, was the power “to restrain or prohibit,” “all kinds of gaming.”

Mr. Swann, for the United States, cited and relied upon *Wells's case*, in this Court, at December term, 1811, (2 Cranch, C. C. 43.)

Mr. Jones and *Mr. Coxe*, for the defendant contended, that the power given to the corporation by the charter, to restrain or prohibit all kinds of gaming, was exclusive, as to the city of Washington, and superseded the common law upon that subject.

The case of *Wells* is not applicable. It was an indictment under the Act of Assembly of Maryland, 1797, c. 110, for keeping a faro-bank in a house occupied by a tavern-keeper, in Georgetown. The power given to the Corporation of Georgetown by the charter was, "to restrain or prohibit gambling;" "and to pass all laws, not inconsistent with the laws of the United States, which may be necessary," &c.

The defendant, Wells, had been fined by a justice of the peace, under the by-law of March 7, 1806, for "gaming" at a faro-bank kept by himself; which act of gaming was at the tavern in which the faro-bank was kept by the defendant, in violation of the Act of Maryland of 1797, c. 110, and was one of the acts of gaming given in evidence at the trial of the indictment. The power of the corporation of Georgetown can not be exercised so as to repeal or supersede the general law of the land; and such was the opinion of the Court, who said that the payment of the fine under the by-law did not prevent the operation of the general law of 1797, c. 110. But the power of the corporation of Washington is unlimited. The subject of gaming is entirely given up to their cognizance, and the by-law covers the whole common-law offence. A by-law enacted under the charter is equivalent, as respects the city, to an act of Congress; upon paying the penalty a man may commit the offence. A conviction, upon the statute, for forging a note of the Bank of the United States, is a bar to a prosecution at common law for forging the same note. Piracy is an offence against the law of nations, and punishable by any nation: a conviction in America is a bar to a subsequent conviction in England. So in cases of concurrent jurisdiction, the court which first has possession of the cause has exclusive cognizance of it. *United States v. Pirates*, 5 Wheat. 197; *Smith v. McIver*, 9 Wheat. 535; *The Ship Robert Fulton*, 1 Payne, 620; *United States v. Bevans*, 3 Wheat. 339. By its charter the corporation of Washington has "full power and authority to prohibit all kinds of gaming." If they have acted upon the subject, and omitted to prohibit, they have sanctioned what they have not prohibited. Having assumed to legislate upon the subject, the power has become exclusive. *Gibbons v. Ogden*, 9 Wheat. 17; *McLearn's case*, in this Court at December term, 1809, (not reported,) was an indictment under the Maryland law of 1798, c. 113, for keeping a billiard-table without a license. By the charter of the city of Washington of May 3d, 1802, [2 Stat. at Large, 195.] the corporation had power "to restrain or prohibit gambling," and to "prevent and remove nuisances," and "to provide for licensing and regulating auctions, retailers of liquors, hackney-carriages," &c. And by the amended charter of February 24, 1804, [Ib. 254,]

they had power "to restrain or prohibit" "all kinds of gaming." On the 25th of May, 1803, the corporation passed a by-law requiring licenses to be taken out for certain objects, and among others, for keeping a billiard-table for gain, upon paying therefor the sum of \$50. This Court was of opinion that the charter of Washington repealed so much of the law of Maryland of 1798, c. 113, as required a license for the keeping of a billiard-table in the city to be taken out from the clerk's office. The Court had before given a similar opinion in regard to retailers of spirituous liquors, &c.

Mr. Swann, for the United States, submitted the case, without argument, upon the following authorities: Hawk. P. C. book i. c. 75, § 6; 1 Mod. 76; 2 Keb. 846; 3 Keb. 464; 5 Mod. 142; 1 Vent. 168; 3 Burrow, 1233; 1 Russell, 433.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*) as follows:

This is an indictment at common law for a nuisance in keeping a common gambling house. Verdict, guilty; subject to the opinion of the Court upon the question whether a conviction before a justice of the peace, under a by-law of the corporation, (Burch's Dig. 95, 16th August, 1809,) for keeping a faro-table, and judgment for the penalty of twenty dollars *per diem*, is a bar to this prosecution; it being admitted that the conviction and judgment before the justice of the peace cover the whole time for which he is charged in the present indictment for keeping the disorderly house.

The indictment charges that the defendant, "on the 15th of January, 1829, and on divers days and times between that day and the day of taking this inquisition, with force and arms, unlawfully did keep and maintain a certain common gaming house; and in the said common gaming house, for hire and gain, on the said 15th day of January, in the year aforesaid, and on the said other times and days, then and there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game called faro; and in the said common gaming house, on the said 15th day of January in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil disposed persons to be and remain playing and gaming at the said unlawful game called faro, for divers large and excessive sums of money, to the great damage and common nuisance of the good citizens of the United States, to the evil example of all others in like cases offending, against the peace and government of the United States."

The by-law of the corporation of 16th August, 1809, entitled, "An act to suppress gaming," enacts,

§ 1. "That after the passage of this act, no E O, A B C, L S D, faro," &c., "or other device to be used with cards," &c., "for the purpose of playing or gaming for money," "shall be set up or kept in any part of this city, under the penalty of twenty dollars for every day or less time that such faro," &c., "shall be so kept and maintained; to be recovered of the person so setting up or keeping the same, before any single magistrate, one half whereof shall go to the informer, and the other for the use of the city council."

§ 2. "That if any person shall permit any faro," &c., to be 'set up, kept, or played' in his house," &c., "he shall incur the penalty of twenty dollars for every day or less time that the same is so 'kept up and maintained,' to be recovered," &c., (as in the 1st section.)

There is no statement of the facts of this case, but I understand that the defendant has been sentenced by the justice of the peace to pay a fine of twenty dollars *per diem* for keeping and maintaining a faro-table in the house of Dr. Smethers, for the whole time proved upon the present indictment.

It is contended, by the counsel of the defendant, that the common law as to the nuisance of a common gaming house is repealed, in regard to the city of Washington, by the powers given to the corporation, "to prevent and remove nuisances;" "to restrain and prohibit" "all kinds of gaming;" "to cause" "all such as keep public gaming tables or gaming houses to give security for their good behavior," "and to indemnify the city against any charge for their support;" "to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by that act, in the said corporation or its officers;" and "to impose and appropriate fines, penalties, and forfeitures for the breach of their laws or ordinances." It is supposed that these provisions cover the whole common-law offence of nuisance arising from the keeping of a public gaming house; and transfer to the corporation of Washington the whole legislative jurisdiction over the subject; and that as the corporation has legislated in part upon the matter, the common-law offence is abrogated; inasmuch as by legislating in part the corporation has signified its will that every thing should be permitted which they have not expressly forbidden. Such I understand to be the argument, and it seems to be the only argument which can bear an appearance of plausibility; for the by-law does not cover the whole ground of the common-law offence. It only punishes the setting up or keeping a faro-table, &c., or permitting it to be set up, kept, or played. But the common-law offence does not consist in the setting up or keeping a faro-table or other device for

the purpose of playing or gaming for money; but in its being kept and used as a public or common gaming house.

The by-law punishes the act of setting up the table — the common law punishes the act of permitting it to be used as a common gaming house. It is this and this only that makes it a common nuisance, and, as such, punishable by fine and imprisonment at common law. The offence created by the by-law, therefore, is not a complete substitute for the common-law offence. It cannot be supposed that Congress, by giving the corporation of Washington power "to restrain and prohibit all kinds of gaming," intended to abrogate the common-law offence before the corporation should have actually legislated upon the subject and provided a substitute. No motive for such an intention can be imagined. It is not in the power of Congress to delegate to the corporation an exclusive right of legislation upon this subject. Its by-laws must be subject to the control of Congress at all times; and it would be natural to conclude that the grant of a vicarious power to legislate upon a subject, would not, until that power is executed, be a repeal of all preëxistent laws upon that subject, any more than it would if the whole power of legislation had been still retained in the hands of Congress. And even, admitting that Congress could delegate the whole power of legislation, and should delegate it, yet such delegation would not, of itself, repeal all the existing laws. They would still remain in force until altered or repealed by the delegated authority. If, therefore, we admit that the power given to the corporation, "to prevent and remove nuisances," authorizes the corporation to define and punish the offence of keeping and maintaining a common gaming house in such a manner as to be a common nuisance, as defined by the common law; yet the corporation not having done so, the common law remains unaltered; and the fact that the defendant has been punished under the by-law, for setting up and keeping a faro-table, is no bar to his conviction of the offence of keeping and maintaining a common gaming house in such a manner as to be a common nuisance.

In the case of *Wells*, at June term, 1812, the indictment was for keeping a faro-table, in a house occupied by a tavern-keeper, contrary to the Act of Maryland, 1797, c. 110. The defence was that he, as keeper of the faro-table, had been fined twenty dollars under the by-law of Georgetown of 7th March, 1806, for "an offence of gaming" at the table. It was there also urged that the act of Congress to amend the charter of Georgetown, (passed March 3, 1805,) giving to the corporation the power "to restrain or prohibit gambling," to impose "and appropriate fines, penal-

ties, and forfeitures, for breach of their ordinances," and "to pass all laws, not inconsistent with the laws of the United States, which may be necessary to give effect and operation to all the powers vested in the said corporation," and the by-law of March 7, 1806, by which the corporation executed the power given them to restrain or prohibit gambling, operated as a repeal of the Act of Maryland of 1797, c. 110.

But the court in that case was of opinion that the act of Maryland was not repealed; and ordered judgment to be entered for the penalty of £50.

The offence under the act of Maryland was the setting up and maintaining a faro table, or other device for the purpose of gaming for money, in a dwelling-house occupied by a tavern-keeper. The offence under the by-law was the setting up, keeping, or maintaining a public gaming house, or public gaming table, or other device for common gaming; and the by-law gave a penalty of twenty dollars for every offence of gaming at the table, to be paid by the keeper, whether it were or were not kept in a house occupied by a tavern keeper.

That case was stronger in favor of the defendant than this; for there the by-law covered the whole offence described in the act of Maryland. The court, however, thought that the penalty of the by-law was cumulative, and intended to be in addition to that imposed by the Maryland law.

The case of licenses for taverns, retailers of spirituous liquors, and billiard tables, is different from this, which is an offence at common law. There the offence was a mere *malum prohibitum*; a penalty for not paying a tax and taking a license from a particular authority. When the tax was given to the corporation, as well as the means to enforce its payment, the whole subject was transferred to the corporation as a matter of revenue.

But a common nuisance is a *malum in se*, or it would not be a common-law offence; and a delegation of power to legislate upon the subject cannot be construed into an intention to repeal the common law; for even a providing a new punishment for a common-law offence has never been held to prevent a conviction upon an indictment for the offence at common law, without express words to that effect; much less would that effect be produced by a delegation of power to legislate upon the subject.

We are, therefore, of opinion, that the offence is still indictable at common law, and that judgment should be rendered for the United States upon the verdict.

Judgment for the United States, for a fine of \$200. See *United States v. Ismenard and Smith*, December, 1803, (1 Cranch, C. C. 150); *Docker's case*, December, 1805; *McLarn's case*,

December, 1809, (not reported); *Wells's case*, December, 1811, (2 Cranch, C. C. 45); and *Dixon's case*, December, 1813, (Id. 92.)

JOSIAH THOMPSON AND WIFE v. GEO. KING'S HEIRS.

The Court will decree a specific execution of an agreement to convey real estate, although the evidence of the conclusion of the agreement be not very clear, if the party in expectation of such an agreement has been put into possession, and has made valuable and expensive improvements upon the property.

THE bill, in this case, states the intermarriage of the plaintiffs in 1812, or 1813, the wife being the daughter of George King, who was then universally supposed to be wealthy, and was seized of a house and lot in Cecil Alley, in Georgetown, which was very much out of repair, and which the plaintiff Josiah, at the request of the said George King, who said he always intended that property for his daughter, (the plaintiff,) repaired, at the expense of \$4,000, and occupied it until 1816, when he removed to the western country. The bill then states that a correspondence was carried on between the plaintiff Josiah and the said George King, respecting the house and lot, which closed with George King's letter of the 29th of April, 1816, accepting the plaintiff Josiah's first proposition, in his letter of the 28th, to take the property at its worth before the repairs, and offering to convey part of the property to the plaintiff Josiah, and the residue to his wife; provided she would not part with it during her life. After this, George King leased the property, as agent for the plaintiff Josiah, and received the rents for him, and accounted with him for them, and always acknowledged the plaintiff's right to the property until his (George King's) death, in the year 1820.

[See the letters in the report of the case, 9 Peters, 204.]

The defendants are the heirs at law of George King.

The bill then prays that the defendants may be decreed to convey the property to the plaintiffs, or, if that cannot be done, that the property may stand charged with the amount of the repairs and improvements; and for general relief.

The defendants, in their answer, say, that being unapprised of the facts stated in the bill, they neither admit nor deny them, but submit them to the jurisdiction of the Court.

CRANCH, C. J. The evidence does not, in my opinion, establish any contract for the conveyance of the lot to the plaintiffs, which can be decreed to be specifically executed; but it shows expensive and permanent improvements and repairs, made by

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Josiah Thompson, under the expectation, encouraged by George King, that the property should be conveyed by him to the plaintiffs, or to one of them; an expectation which seems to create an equity in favor of J. Thompson; but whether it creates a special lien on the property, so as to give him a right to priority of payment, I am not yet satisfied.

The COURT, however, on the 5th of April, 1822, (CRANCH, C. J., absent,) pronounced a decree, directing a conveyance in fee of the property claimed in the bill to Josiah Thompson.

This decree was reversed by the Supreme Court, 9 Peters, 204.

BANK OF COLUMBIA v. JAMES MOORE.

The Court refused to instruct the jury, that the casual acknowledgment of the debt to a stranger is not such an acknowledgment as was sufficient to take the debt out of the statute of limitations.

ASSUMPSIT upon the defendant's promissory note, payable to G. Docker, or order, and by him indorsed to plaintiffs.

Upon the plea of limitations, the plaintiffs' witness testified that he overheard the defendant say to his companions, who were no parties to the note, that he owed no debt, excepting one \$500 note to the Bank of Columbia.

Whereupon *Mr. Jones*, for the defendant, prayed the Court to instruct the jury, that the evidence aforesaid did not import such an acknowledgment of the debt in question, as was sufficient to take it out of the statute of limitations.

Which instruction the COURT (CRANCH, C. J., *contrà*,) refused to give, and the jury rendered their verdict for the plaintiffs.

The defendant's counsel moved for a new trial, on the ground of error, in refusing the instruction; but the Court, believing that the justice of the case was with the plaintiffs, refused to grant it.

The counsel for the defendant then applied to the Chief Justice, MARSHALL, and obtained a writ of error to the Supreme Court, where the judgment was reversed, in 1832. (See 6 Peters, 86.)

NEGRO MARIA v. JOSEPH M. WHITE.

A slave was brought into this county by her master, a delegate from the Territory of Florida, to wait upon his family while attending Congress; and, at the end of the session, not being in a condition to be carried back with safety, was left here until

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the meeting of the next Congress, with leave to hire herself out, and receive her wages to her own use, which she did until the return of her master, who was re-elected, and who, at her request, offered to sell her to her husband, a free colored man, residing in Washington, for \$400, if he could raise the money, but he could not, and never paid it, or any part of it.

The Court (*nem. con.*) refused to instruct the jury that these facts were not evidence of an importation, contrary to the Maryland Act of 1796, c. 67.

They also refused to instruct the jury, that, upon that evidence, they ought to find their verdict for the defendant; but instructed them that the petitioner is not entitled to freedom under the first section of the act, unless she was brought into this county, by the defendant, for sale, or to reside therein; and that the circumstances stated, although found by the jury, are not conclusive evidence that the petitioner was brought into this county with such intent, or for sale; and that the residence contemplated by the first section of the act is a permanent residence, as contradistinguished from a sojournment.

The Court also refused to instruct the jury, that the defendant's offer and agreement to sell the petitioner to her husband, under the circumstances stated, was evidence of an importation, contrary to the Act of 1796, c. 67, unless the jury should believe, from the circumstances given in evidence, that the defendant had no intention, at the time of importation, that she should be sold, or should reside in this county.

THE petitioner, negro Maria, claimed her freedom by reason of importation, contrary to the Act of Maryland, 1796, c. 67; by the first section of which it is enacted, "that it shall not be lawful to import or bring into this State, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this State. And any person brought into this State as a slave, contrary to this act, if a slave before, shall thereupon cease to be the property of the person or persons so importing, &c., and shall be free."

By the fourth section it is provided, "that nothing in this act contained shall be construed or taken to affect the right of any person or persons travelling or sojourning with any slave or slaves within this State, such slave or slaves not being sold, or otherwise disposed of in this State, but carried out of this State, or attempted to be carried."

Upon the trial, evidence was given to prove that the petitioner was the slave of the defendant, a resident of the Territory of Florida, and the delegate in Congress from that Territory. That he brought the slave to Washington to wait upon his family, while he was attending Congress, in the winter of 1828 - 1829. That she remained with his family during the session; but, at the end of the session, on the 4th of March, 1829, was too far advanced in pregnancy to be removed, with safety, to Florida; and was, therefore, left by her master in Washington. That, at her request, after her confinement, she was permitted by her master, who was re-elected, to hire herself out in Washington, until he should return to Congress, in December, 1829; which permission was given by a writing inclosed in a letter to Mr. French, the agent of the defendant. That she accordingly hired

herself out, and received her wages to her own use. That the defendant, learning that she had a free husband in Washington, and that she wished to live with him, agreed that if he could raise \$400 for him he should have her. That the money was never raised, nor any part of it ever paid to the defendant.

Upon this evidence, *Mr. Key*, for the petitioner, prayed the Court to instruct the jury, that if, from the evidence, they found the facts to be as above stated, then the continuing of the petitioner in this county, under such circumstances, is evidence of an importation contrary to the law of 1796, c. 67.

But the COURT (*nem. con.*) refused to give the instruction.

Whereupon *Mr. Swann*, for the defendant, prayed the Court to instruct them, that upon these facts, if believed by them, they ought to find their verdict for the defendant.

Which instruction the COURT refused to give; but instructed them that the petitioner is not entitled to freedom under the first section of the Act of 1796, c. 67, unless she was brought into this county by the defendant for sale, or to reside therein; that the circumstances aforesaid, although proved to the satisfaction of the jury, are not conclusive evidence that the petitioner was brought into this county with such intent, or for sale; and that the residence contemplated in the first section of the act is a permanent residence, as contradistinguished from a sojournment.

Mr. Key then prayed the Court to instruct the jury, that "if they believed that the defendant contracted with the husband of the petitioner, (a free man,) for the purchase of the petitioner, at the price of \$400, and that the said husband agreed to pay the said sum of money, as the price of the petitioner; then such contract is evidence of an importation contrary to the Act of Assembly of 1796. Unless the jury should, from the circumstances given in evidence, believe that the defendant had no intention, when he brought in the petitioner, of her being sold, or residing in this county."

But the COURT refused to give the said instruction. And CRANCH, C. J., suggested a doubt, whether a slave gained his freedom, under the third section of the act, by being sold within three years after being imported, if he was not originally imported for sale, or to reside.

The cases cited in argument were, *Baptiste et al. v. De Volunbrun*, 5 Har. & Johns. 86; *Defontaine v. Defontaine*, in a note to the former case, 5 Har. & Johns. 86; *Henry v. Ball*, 1 Wheat. 5; *Gardner v. Simpson*, in this Court, at April term, 1823, not reported; *Negro William Jordan v. Sawyer*, in this Court, at the same term, (2 Cranch, C. C. 373); *Stewart v. Nokes*, 5 Har. & Johns. 107.

JAMES BELT v. THOMAS COOK'S EXECUTORS.

Extra work, done upon houses built by contract in writing, cannot be recovered of the owner, unless there was a separate contract between the parties that such extra work should be done by the builder, and paid for by the owner; or unless the owner, while the houses were building, requested the builder to do the extra work, knowing that it was not comprehended in the written contract, and that the cost of the houses would be thereby increased.

The mere circumstance of the owner's knowing that the extra work was doing, and not objecting to it, does not raise a contract on his part to pay for it; but is evidence competent to be given to the jury, tending to prove that there was an agreement that the extra work should be paid for by the owner.

ASSUMPSIT, for extra work done upon two houses, under a written contract under seal.

Upon the trial, the Court, at the prayer of *Mr. Jones*, for the defendants, instructed the jury, "that the plaintiff is not entitled to recover upon the evidence aforesaid, for the work charged as extra work, over and above the sums specified in the said written contract, unless the jury should be satisfied, by the evidence, that there was a separate contract between the parties that such extra work should be done by the plaintiff, and paid for by the defendants' testator, over and above the sums stipulated in the aforesaid written contract. Or unless the said testator, while the houses were building, required or requested the plaintiff to do the said extra work, knowing that it was not comprehended in the said written contract, and that the cost of the said houses would be thereby increased. And that the mere circumstance of the said testator's knowing that the plaintiff was doing the said work, and not objecting to it, if proved to the satisfaction of the jury, does not raise a contract on his part to pay for it, over and above the sums stipulated in the said written contract; but is evidence competent to be given to the jury, towards satisfying them that there was an agreement between the parties that the said extra work should be paid for by the testator.

The defendant's counsel cited *Ellis v. Hamlen*, 3 Taunt. 52; *Starkie on Ev.* part 4, p. 1002; and *Young v. Preston*, 4 Cranch, 239.

Verdict for plaintiff, \$216.61, and interest. Motion for a new trial, — overruled, — and judgment.

WALTER B. BEALL v. BECK, Bailiff of Archer.

The slave of a stranger, hired to, and in the service and employ of a lodger in a boarding-house, with the consent of his owner, and found upon the premises, is not liable to be distrained for rent due by the boarding-house keeper, being exempted by the broad principle of public convenience.

The distinction between an inn and a boarding-house is, that into the former all travellers have a right to enter and demand accommodation; but the keeper of a boarding-house has a right to select his guests.

A slave, hired as a servant to a lodger in a boarding-house, is not exempted from distress for rent, on the ground of his being in the actual use and personal service of his master, unless he is so at the time of the seizing of him by way of distress. It must be such an actual use, that the taking of the slave would be, or tend directly to a breach of the peace, even if taken from the tenant himself.

The case is strengthened by the fact that the landlord rented the house to be occupied as a boarding-house.

REPLEVIN, for the plaintiff's slave William, hired to Mr. Easton, who was a boarder at Mrs. Rich's boarding-house, for whose rent, due to Mr. Archer, the slave was, by his order, distrained.

The defendant made cognizance as bailiff of William Archer, for \$90 rent arrear due by Mrs. Rich.

The plaintiff pleaded, 1st. That the slave was not, at the time when, &c., in the said dwelling-house of Mrs. Rich, as the servant, and in the employment of the said Ann E. Rich, but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the said plaintiff; upon which issue was joined.

2d. The same plea with this addition, that there were, at the time when, &c. goods and chattels of the said Ann E. Rich in the said dwelling-house, &c., in which, &c., more than sufficient to satisfy the said rent-arrear, and then and there liable to distress for the said rent. To this plea there was a replication, demurrer, and joinder.

3d. That the said Ann E. Rich, during her occupation and enjoyment of the said dwelling-house, &c. in which, &c. by virtue of the demise in the said cognizance mentioned, used and followed the trade and business of a common public boarding-house keeper for travellers and strangers, and used the said premises in her said trade and business for entertaining, victualing, and lodging strangers and travellers, and that the said slave was in the employment and service of one William C. Easton, then in the said dwelling-house as a guest and lodger of the said Ann E. Rich, at the time when, &c. and this the said plaintiff is ready to verify, &c. To this plea there was a general demurrer and joinder.

4th. The fourth plea was the same as the third, only charging the *locus in quo* to be a common inn, instead of a public boarding-house. Upon this plea, issue was joined.

5th. That the slave being, at the time when, &c. hired by the plaintiff to one William C. Easton, was, at the said time, in the said dwelling-house and place in which, &c. in attendance upon the said Easton as his servant and waiting-man; and at the time

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when, &c. was actually engaged in performing for the said Easton, the duties and services of such servant and waiting-man, and in his the said Easton's actual use and personal service, and this the plaintiff is ready to verify. Upon this plea, issue was joined.

6th. That the slave was not the property of the said Ann E. Rich, but of the plaintiff; and that there were goods and chattels of the said Ann, in the place in which, &c. sufficient to satisfy the said rent; and that the said William Archer, knowing that the said slave was the property of the said plaintiff, fraudulently and maliciously ordered and caused his bailiff, the said defendant, to distrain the said slave for his said rent; and this the plaintiff is ready to verify, &c. To this plea also issue was joined.

Upon the issues of fact a verdict was taken, subject to the opinion of the Court upon the demurrers, and upon the facts in evidence; upon which, if the opinion of the Court be in favor of the defendants, judgment to be rendered in his favor for \$65, the rent in arrear, &c.

The facts stated were as follows: "That William Archer rented the premises to Mrs. Rich, to be occupied as a boarding-house, and that she publicly advertised to keep a boarding-house, for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests. That William C. Easton was a lodger and boarder in the said house, and hired, of the plaintiff, the slave in question for his own exclusive service as a domestic servant, and took him into his service, and kept him in the said house, as his exclusive servant, without being under the control of Mrs. Rich, although, by permission of Mr. Easton, he occasionally rendered her services when not engaged in his master's business. That Mr. Easton paid for his hire, and clothed him. That when the bailiff came to levy the distress, he was informed by Mrs. Rich that the slave was not her property, but was the property of the plaintiff, and was the hired servant of Mr. Easton, and exclusively in his employment, and that there were goods enough, the property of Mrs. Rich, on the premises, to satisfy the rent.

Mr. Wallach, for the defendant. All personal property on the premises, with a few exceptions is liable for rent. It is immaterial whether there were sufficient goods of the tenant on the premises or not. The only excepted cases are upon the principle of trade and commerce. A coach at public livery, and goods of an inmate at a public inn, are not exempt. *Francis v. Wyatt*, 3 Bur. 1498. The reason why a horse at an inn is not liable to

distress for rent, is, that the innkeeper is bound to receive him and has a lien upon him for his food. *Robinson v. Walter*, 3 Bulstrode, 269; 8 Petersdorff, 424; *Francis v. Wyatt*, 3 Burr. 1498; *Gorton v. Falkner*, 4 T. R. 568; 7 Serg. & Louber, 356; Hammond, N. P. 375.

Mr. C. C. Lee, and *Mr. Jones*, for the plaintiff.

Originally, non-payment of rent or services, was a forfeiture. Afterwards the profits only could be seized, not any thing necessary to enable the tenant to perform the service or pay the rent, such as beasts of the plough, &c. *Bradby on Distress*, 211. Next came the principle of benefit to trade, such as meal at the mill, a horse at the market, or at pasture. 9 Viner, 144. Goods on a wharf, or in a warehouse on storage. *Thompson v. Mashiter*, 1 Bing. 283. Cheese in a cart stopping at a private house, *Gibson v. Hurst*. A loom in actual use, or if there be other sufficient distress. *Simpson v. Hartopp*, Willes, 514. Goods at auction. *Wyatt v. Richardson*, 1 Bay, 102. A slave accidentally on the premises. *Bull v. Horlbeck*, 1 Bay, 301. A hair-dresser's apprentice. *Phelan v. McBride*, 1 Bay, 170. But all these exemptions rest on the broad basis of public inconvenience. *Gilman v. Elton*, 3 Brod. and Bing. 75; S. C. 6 Moore, 243; 8 Petersdorff, 423, 425; and *Packard v. Van Ness*, 2 Peters, 137. The case of the goods of lodgers in a public boarding-house comes within the same principle; for the trade of keeping a boarding-house, so necessary for the accommodation of the public, especially at the seat of the government, would be broken up if the goods of the lodgers should be liable to distress for rent.

CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J., dissenting.)

1. Upon the first issue, the jury has found "that the slave was not, at the time when, &c. in the said dwelling-house, as the servant and in the employment of Mrs. Rich, but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the plaintiff."

This finding, however, is subject to the opinion of the Court upon the facts in evidence, which are agreed to be as before stated; and the question for the Court upon this issue is, whether the verdict is justified by the evidence.

We think it is not; because it does not appear that the slave was accidentally upon the premises, at the time of the distress, but was there as the servant of Mr. Easton, who was then a boarder and lodger in the house, and kept the slave there as his exclusive servant.

This plea was probably drawn with a view to the case of

Bull v. Horlbeck, 1 Bay's S. Car. Rep. 297, where the jury found a verdict for the plaintiff, the owner of the slave, against the opinion of a majority of the court, who instructed the jury, that the slave of a stranger found accidentally on the premises, is liable to distress for rent; and the reporter adds, that the verdict has been acquiesced in, and the case often relied upon since.

In that case, a distinction was taken between cattle and slaves; because the master cannot confine his slaves, as he can his cattle; and it was also said that the common law never contemplated this kind of property. The principle upon which that case was decided by the jury was, the public convenience. The word, "accidentally" in that case means without the license of the master; which was not the case with Mr. Easton's servant. He was not, therefore, in the house accidentally within the meaning of the case of *Bull v. Horlbeck*.

2. The second plea of the plaintiff is like the first, with this addition; that there were, at the time of the distress, goods and chattels of the tenant, in the house, more than sufficient to satisfy the rent in arrear, and then and there liable to distress for the same.

To this plea the defendant replied; concluding with this traverse, namely: "without this, that the said slave was not at the time when, &c. in the said dwelling-house, as the servant of the said Ann E. Rich, but accidentally, and while in the service of one William C. Easton, to whom the said slave was hired by the said plaintiff; and that there were, at the time when, &c. goods and chattels of the said Ann E. Rich, in the said dwelling-house, &c. more than sufficient to satisfy the said rent-arrear, and then and there liable to distress for the said rent, &c. To this replication there was a general demurrer and joinder.

Upon this demurrer the Court is confined to the facts stated in the pleadings. In considering the validity of the defendant's replication, the Court cannot take the inducement to the traverse as true, because the defendant, by tendering an issue upon the allegations of the plaintiffs' plea has prevented the plaintiff denying the matter of inducement to the defendant's traverse. The traverse is to a material part of the plaintiff's plea, and is well taken; there is, therefore, no fault in the defendant's replication; nor is there any suggested in the cognizance.

We think, therefore, that the judgment upon this demurrer ought to be for the defendant.

3. The third plea, in substance, is that Mrs. Rich, during her occupation under the demise, used and followed the trade and

business of a common public boarding-house keeper, for entertaining, victualling, and lodging travellers and strangers, and used the said premises in her said trade and business; and that the slave was on the premises, in the service and employ of one of her lodgers and guests, then in the house.

To this plea there is a general demurrer and joinder. The question arising upon this demurrer is, whether a slave of a stranger, hired to and in the service and employ of a lodger in a boarding-house, with the consent of his owner, and found upon the premises, is exempt from distress for rent, there being no other property upon the premises liable to distress?

All the exceptions to the general rule of liability are founded upon the public inconvenience which would attend its application in particular cases. The general rule itself was adopted to counteract the fraud of tenants, and to prevent that litigation which would arise if the question of title to the property was to be tried in every case of distress. One broad rule, therefore, was laid down, that every thing found upon the premises should be liable for the rent; and as every person was bound to know the rule, it would be his own fault if he permitted his goods to be in such a situation as to be liable to seizure. But there were cases of necessity and accident which would, sometimes, place a man's goods in that situation against his will. These ought to be provided for. Such is the necessity of sending corn to a mill to be ground. In this case the corn would not be voluntarily nor negligently subjected to the power of the landlord. The owner of the corn and his family must not starve for want of meal. The corn, therefore, is excepted from the general rule. The corn could not be carried without a bag, &c., nor conveniently without a horse. The bag and the horse, therefore, are equally protected under the plea of necessity. The case of a common inn is also a case of necessity. The weary traveller must have repose. He is obliged to place his goods upon the premises of some landlord.

Other cases, although not of such apparent necessity, are excepted on the ground of public utility and convenience. Thus cloth sent to the tailor's to be made up into garments — a horse sent to the farrier's to be shod — a carriage at a coachmaker's to be repaired — goods at a market, or on the way, and the carriage and horses which convey them; — these, although bordering on the plea of necessity, are yet, more properly, arranged under the principle of public convenience. It is a great convenience to the public that these trades should exist, and that goods should be brought to market; but the privilege of the landlord would prevent people from employing these tradesmen, and

from bringing goods to market. So far, therefore, that privilege is restrained by law. The instances cited in the books are only examples of the general principle of public convenience. Whenever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law. The same principle protects the tools of the mechanic and the books of the scholar, the *averia caruæ*, and the implements of husbandry, so long as other distress may be had. It extends also to the protection of trade and commerce. Thus goods in the hands of a factor or broker, or vendue-master, to be sold, or in a warehouse upon storage, or upon a wharf on wharfage, are exempt from the distress of the landlord. It is said that the principle is confined to the benefit of trade and commerce; but trade and commerce are only instances of the application of the general principle of public convenience, which is the broad ground of all the exceptions. The keeping of a boarding-house is not only a benefit to trade and commerce in the more general acceptation of those terms, but is, of itself, a trade. One of the legal definitions of trade is, "a way of living." It is an honest and a lawful occupation, and is useful to the public, especially in a city like this, where there must of necessity be many temporary residents. If the trunks and clothes of the lodgers should be liable to distress for rent in common boarding-houses, it may be said in the language of Lord Mansfield, in *Francis v. Wyatt*, 1 W. Bl. 485, in regard to livery-stables, "they will all be deserted and undone; for no prudent man will make himself liable to such a hazard." So the privilege of the landlord, if not restrained in this respect, would destroy this lawful trade of keeping a common boarding-house—this way of living—which would be a great inconvenience to the public; for then all temporary residents would be obliged to depend on private hospitality, or to lodge at a common inn, where the innkeeper is bound to receive all sorts of guests.

But the case of *Francis v. Wyatt*, 3 Burr. 1499, is relied upon to show that goods of a lodger in a common lodging-house are liable to distress for rent.

That was an action of replevin, for a chariot standing at livery in a coach-house belonging to a common livery-stable, distrained for rent due by the keeper of the stable. The case was twice argued by counsel of very high standing; and Mr. Blackstone, who argued on the side of the landlord, thought that he fortified his argument, by saying that the case did "not differ at all from that of goods put into a common lodging-house, and there distrained by the landlord for rent in arrear."

That cause does not appear to have been actually decided;

but the opinion of the court was intimated so strongly against the plaintiff that he declined a third argument, which the court would have granted him. In the report of the case, however, in 1 W. Bl. 485, it is said that judgment was rendered for the defendant, upon the ground of its being a "part of the profits of the premises;" following the idea suggested by Mr. Blackstone in his argument, that the owner of the chariot was to be considered as an under-tenant to the stable-keeper. However, the counsel for the plaintiff seem to have had the better of the argument upon principle; and the ground which they took has been supported by subsequent judges, as in the case of wharfage, *Thompson v. Mashiter*, 1 Bing. 283, and in the case of factorage, *Gilman v. Elton*, 3 Brod. & Bing. 75.

The opinion of the court in *Francis v. Wyatt* seems to have been founded rather upon the technicalities than upon the principles of the law. Lord Mansfield, in that case, said, "That whatever may be the law of the case, it is worth the defendant's while to consider the consequences of such a distress, which will ruin his estate. For if it should be determined that carriages and horses, standing at livery, are liable to be distrained by the lessor for rent, the livery-stables will be deserted and undone; for no prudent man will make himself liable to such a hazard; therefore let the case stand over for further argument, and let the defendant, in the mean time, seriously consider how far, in prudence, he ought to press the question." 1 W. Bl. 485. He could hardly have used stronger language to show that the case was within the general principle of public convenience; and if that case had happened after the case of *Gilman v. Elton*, it would probably have been decided upon the same principles which governed the latter. He admits that the privilege of the landlord, if enforced, would ruin the trade; and it is upon that very ground that the exception rests in favor of trade and commerce. A man must have with him, wherever he goes, some articles of indispensable necessity, such as clothes, &c., things of daily use for his personal comfort and convenience; if he is not to be protected in the enjoyment of these, at a boarding-house, he must abandon it; and the trade, or occupation, as a means of living, will be destroyed. If these are protected, the trunk which contains them must share in the same protection. How far will this principle lead us? It would be difficult to draw the line around articles of necessity only; for what would be considered as necessary to one man might be considered superfluous to another. The line is not well defined between articles of necessity and articles of comfort. The principle which governs these cases seems to require that the line should extend to such

articles of personal convenience and comfort, the property of the lodger, as are in his ordinary use.

The principle of public convenience goes to the absolute exemption of all articles within its reach. Thus, the cloth at the tailor's, the horse at the farrier's, the corn at the mill, the goods at the factor's, or in the warehouse, or upon the wharf, are all absolutely protected, whether there be or be not sufficient goods of the tenant on the premises liable to distress.

The plea states that the slave was in the service and employ of the lodger, at the time he was taken.

In such case, we think the slave was protected by the general principle of public convenience, and that the case may even be brought within that branch of the general principle which relates to trade and commerce.

The case of *Himely v. Wyatt and Richardson*, 1 Bay, 100, was decided by a superior court of South Carolina forty years ago. It was replevin for goods sent to a vendue warehouse for sale, and distrained by the landlord for rent. The court decided that they were protected under the principle of public utility and convenience; and Mr. Justice Waties, who delivered the opinion, said: "The reason why a stranger's goods are subject to distress is, because infinite frauds would be otherwise practised upon a landlord; and his summary remedy, in this case, might at any time be defeated by a collusion between his tenant and a stranger. All goods, therefore, found on the premises, belonging to strangers or tenants, are generally distrainable. They are presumed to be the property of the tenant, because in his possession. There is no instance in which possession is regarded so much, as the evidence of property, as in this, to preserve the right of the landlord from fraud and imposition. This appears to be the sole object of the law, and therefore admits of exceptions when this mischief does not occur. For when the possession of the goods by the tenant holds out no fallacious security to the landlord, but they are known to belong to a stranger, in that case they are privileged from distress; as in the case of a horse at an inn, or in a smith's shop to be shod, cloth at a tailor's, and sacks of corn in a market or mill, &c., these are privileged and protected for the benefit of trade; but, in my mind, it is as good a reason that the property (notwithstanding the immediate possession is in the tenant,) is known to the landlord not to belong to the tenant, but to his customers. No presumption of property can arise from the possession, and therefore the landlord is not deprived of any security he may have trusted to in them for the payment of the rent. With respect to the present case, all the different reasons for an exemption apply with great force. The

defendants, when they leased their house to a vendue-master, could never have had in contemplation any remedy they might have against the goods of various persons which might be lodged with him for sale. They must have known that these were not his property, and must have relied on other resources for the recovery of their rent. Considering then the well-known use of vendue stores as the depositories of the goods of strangers only, and which are placed there, as it were, by the authority of law; and considering also the public convenience and utility of them, there appear to me the strongest grounds for extending to them the protection of the law."

So also in the case of *Phalon v. McBride*, in the year 1791, 1 Bay, 167, which was replevin for the plaintiff's slave, bound apprentice to a hair-dresser, and distrained for rent due by the hair-dresser to his landlord. "The court was unanimously of opinion that the negro boy was not liable to be distrained, upon the principle, that goods in the way of trade are exempted." And they said, that "the case of *Himely v. Wyatt* was adjudged upon wise and legal principles;" "and that it would be hard and unreasonable, under those circumstances, to make the property of a third person liable for the default of a tenant."

So also in the case before mentioned, of *Bull v. Horlbeck*, 1 Bay, 297, although a majority of the court (against the opinion of Judge Bay,) decided that a slave of a stranger, accidentally found on the premises, was liable to a distress for rent, yet the jury found a verdict against the opinion of the majority, which verdict was acquiesced in, and has often been relied upon since.

So also in the case of *Gilman v. Elton*, 3 Brod. & Bing. 75, in which the Court of Common Pleas, in England, decided in the year 1821, that the goods of the principal, in the hands of the factor, cannot be distrained for the factor's rent. Dallas, C. J., said — "The general right of landlords to distrain is clearly protected in point of law; and I agree that, whatever is found on the premises is, *primâ facie*, taken as belonging to the tenant. The rule grows out of the relation of landlord and tenant, and out of the nature of the thing itself; for all such rules are of simple origin. But rules which are of simple origin, if very general, become in time, and from change of circumstances, inconvenient, and thence subject to exceptions. Exceptions to this general right of distress arose at a very early period, and have ever since been recognized by the courts." And after citing the words of Mr. Justice Ashurst, in *Gorton v. Falkner*, 4 T. R. 568, in which he states the foundation of the landlord's right to distrain the property of a stranger on the premises to be, "that the

landlord is supposed to give credit to a visible stock on the premises ;” and that it is founded, also, on public convenience and the prevention of fraud ; and that “ the exceptions out of the general rule are all of them tending to the benefit of trade and commerce, and general advantage ;” he says — “ The rule was evidently founded not on natural, but artificial arrangements. It was a rule to prevent a particular species of inconvenience, which would otherwise have arisen. But as it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favor of trade and commerce ; and, as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favor of trade and commerce.” Again, he said — “ The public convenience runs through all the cases of exception. And, on general principle and analogy, this question comes within the scope of those decisions.”

Mr. Justice Park, in the same case, said — “ The instances mentioned under the exception as to trade, by Lord Coke, are not put as limiting or comprehending the whole exception, but merely by way of illustration. The principle of the exception is admirably put by Lord Holt, in *Salk.* 250 ; and his language shows that the exception was not established for the benefit of the individual, but of trade in general. The case in *Cro. Eliz.* (*Rede v. Burley*,) is strong to show that it is the trade which is favored, not the individual.”

Mr. Justice Burrough, in the same case, said — “ This case is to be decided on principle ; and on the principle of all the decisions. From the earliest times, these exceptions to the general right of the landlord to distrain, have existed ; the question, therefore, is, whether this case falls within the principle of the exception in favor of trade.” In none of the cases has that principle been put as if in favor of any particular trade, but for the advantage of trade in general.

And Mr. Justice Richardson said — “ The advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage.” “ The instances enumerated by Lord Coke, under the exception in favor of trade, are only put by way of example, and the present case falls clearly within the principle of the exception.”

So in the case of *Thompson v. Mashiter*, 1 Bing. 283, where the goods of the principal, which had been put by the factor

into the warehouse of Ramsay, a wharfinger, were, upon the same general principle, held to be exempted from distress for rent due for the wharf and warehouse. Dallas, C. J., said, "that the case is the same as if the owner had sent them immediately to Ramsay's, where, on the broad principle of public convenience, I think they were not liable to distress."

Mr. Justice Park said — "The cases were all considered in *Gilman v. Elton*; and the general principle laid down in that case is applicable to the present. The principle there laid down was, that certain exemptions of goods from distresses were permitted, not on account of the character of the individual in whose hands the goods were deposited, but for the benefit of trade. On that general ground we now decide; and not on the ground that Ramsay was the servant, or stood in the place of the factor. The instances put by Lord Coke are merely illustrative, but they apply in principle, though none of them, perhaps, in terms." "Therefore, keeping to the broad and general principle of convenience, and benefit to trade and commerce, I think these goods ought not have been distrained."

These cases show that the principle is broad enough to cover a slave, the personal servant of a lodger, at a common boarding-house; and that the principle, if it applies at all, goes to the total exemption of the property thus situated, whether there be other sufficient distress or not.

We are, therefore, of opinion that the demurrer to the third plea of the plaintiff ought to be overruled.

4. The fourth plea of the plaintiff was the same as the third, except charging the *locus in quo* to be a common inn. Upon this plea issue was joined, and found for the plaintiff, but subject to the opinion of the Court, whether the facts justified the verdict.

It is not clearly stated in the books what are the essential requisites of a common inn, *commune hospitium*, or what distinguishes it from a common boarding-house.

It appears, however, by the *Registrum Brevium*, 105, (see Fitz. N. B. 104, (B,) and Co. Ent. 347,) that common inns must be kept "*ad hospitandos homines, per partes, ubi hujusmodi hospitia existunt, transeuntes*;" that is, for the entertainment of travellers passing through those parts of the country where the inns are. *Calve's case*, 8 Co. 32. And "it is no way material that he should have any sign before his door or not, if he make it his common business to entertain passengers." 1 Hawk. P. C. c. 78, § 2, p. 452; *Rex v. Collins et al.* Palmer, 373. And, in section 4, Hawkins says — "Also it seems to be settled, at this day, that any person may lawfully set up a new

inn, unless it be inconvenient to the public in some of the respects taken notice of in the first section, and that he has no need of any license from the king for this purpose; for the keeping of an inn is no franchise, but a lawful trade, open to every subject. But if an inn degenerate into an ale-house, by suffering disorderly tippling, it shall be deemed as such."

It is true that, by the Act of Maryland, 1790, c. 24, ordinary-keepers are required to take out an annual license; but the eighth section, by imposing a fine on any person "who shall presume to keep ordinary without a license," shows that an ordinary may exist without a license.

The intent of the party, manifested by his acts, must decide whether the house is kept as a common inn, into which all travellers have a right to enter and demand accommodation; or a boarding-house, in which the keeper has a right to select his guests.

The statement of facts shows that Mr. Archer rented the premises to Mrs. Rich, to be occupied as a boarding-house; and she publicly advertised to keep a boarding-house. It is, indeed, stated to be for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests; but still she advertised it as a boarding-house, not as an inn, probably intending to reserve to herself a right to select her guests.

We think, therefore, that the verdict of the jury upon this issue is not supported by the evidence.

5. The question arising upon the verdict found in favor of the plaintiff upon the fifth plea, is, whether the verdict is supported by the state of the facts.

The matter found by the verdict, upon this issue, is, that at the time the slave was taken he was "in attendance upon the said W. C. Easton, as his servant and waiting-man, actually engaged in performing for him the duties and services of such servant and waiting-man, and in the said Easton's actual use and personal service."

We think this verdict is not supported by the evidence; for it does not appear, by the statement of facts, that the slave, at the time of caption, was in the actual use of Mr. Easton. It is only stated that, "when the bailiff came to levy the distress, he was informed by Mrs. Rich that the slave was not her property, but was the property of the plaintiff, and was the hired servant of Mr. Easton, and exclusively in his employment."

We do not think that it can be, from that, inferred that the slave was in the actual use of Mr. Easton at the time he was taken, within the meaning of the rule of law, that goods in the actual use of any person cannot be distrained. It is a rule

which applies to the goods of the tenant himself, as well as to those of a stranger; and implies such an actual use, that the taking thereof would be, or tend directly to, a breach of the peace.

6. The verdict, on the issue joined on the sixth plea, finds that the slave was the property of the plaintiff; that there were goods of the tenant on the premises sufficient to satisfy the rent; and that the landlord, knowing the same, fraudulently and maliciously caused the defendant to distrain the slave.

The question arising upon the verdict on this issue is, whether it is supported by the facts stated.

We think it is not; for fraud and malice, which are the gist of this plea, are not to be presumed, but ought to be clearly proved. The only circumstance stated in this plea, from which fraud or malice could possibly be inferred, was the knowledge of the landlord that the slave was the property of the plaintiff, and that there were goods enough of Mrs. Rich's to satisfy the rent. But there might be other motives to induce him to distrain the slave; and that charity which the law itself demands, in respect to an allegation of fraud, requires us to presume the motive to be good until the contrary appears.

We have, so far, considered the case as it appears upon the pleadings, compared with the statement of the facts.

But there is no one of the pleas which brings into view the whole merits of the case.

The verdict for the plaintiff has been rendered, "subject to the opinion of the Court upon the demurrer, and upon the facts in evidence; upon which, if the opinion of the Court be in favor of the defendant, judgment is to be rendered in his favor for \$65, the rent in arrear."

The facts in evidence were substantially as follows:

That the landlord rented the premises to Mrs. Rich, to be occupied as a boarding-house, and that she publicly advertised to keep a boarding-house for the entertainment of all persons, travellers and others, for one or more days, at the will of the guests. That, at the time when, &c., W. C. Easton was a boarder and lodger in her house, and hired of the plaintiff, the slave in question, for his own exclusive service, as a domestic servant; and took him into his service, and kept him in the said house, as his exclusive servant; and that while the said slave was so in the said house, as the exclusive servant of Mr. Easton, and in his exclusive employment, he was, by the order of the landlord, distrained for rent due by Mrs. Rich to the landlord. That at the time of making the distress, the defendant was informed by Mrs. Rich that the slave was the property of the plaintiff, and was the

hired servant of Mr. Easton, one of her boarders, and exclusively in his employment. The fact is also stated, that there were goods enough the property of Mrs. Rich, upon the premises, to satisfy the rent.

The question then is, whether, if these facts had been formally pleaded, the plaintiff would be entitled to recover in this action.

It is evident that all the reasons which we have before urged, in support of the opinion expressed upon the demurrer to the third plea, are of equal weight upon the merits of the case as here stated; and in addition thereto are the important facts that there were other goods upon the premises, the property of the tenant, sufficient to satisfy the rent; and that the bailiff was informed, at the time of the distress, that the slave was not the property of the tenant, but of the plaintiff, and in the exclusive service of Mr. Easton, a boarder and lodger in the house.

These additional facts, we think, removed all doubt, with respect to the plaintiff's case, even if the Court should have erred in its opinion upon the demurrer to the plaintiff's third plea.

The circumstance that the landlord rented the house to be occupied as a boarding-house is very important. It is *prima facie* evidence of his assent that the lodgers should place upon the premises such articles as were necessary for their comfort and convenience, and that he knew they were not the property of his tenant. They held out to him no deceitful evidence of security for his rent; and he could not, with a good conscience, have relied upon them as a fund out of which the rent was to be paid. Even if there had not been sufficient property of the tenant on the premises to satisfy the rent, it would have been unconscionable, if not fraudulent in him, to have distrained this slave, after having been informed that he was the property of the plaintiff, and was the personal servant in the exclusive employment of one of the lodgers and boarders in the house; and to do it with that knowledge when there was sufficient property of the tenant liable to his distress, was evidence from which the jury might have inferred malice, and perhaps fraud. It would be like the case of *Fowkes v. Joyce*, in 2 Vern. 129, where a grazier, driving sheep to London, was encouraged by the tenant, to put his sheep into the close for one night, which he did, with the consent of the landlord, who distrained them for rent due by the tenant. This distress was adjudged valid at law, but the grazier was relieved in equity upon the ground of fraud; and the reporter says the court looked upon it as a fraud and contrivance in the landlord, to subject the sheep to his distress. Saunders, in his note on p. 289, (b,) speaking of that case, says, "and it should seem that, at this day, a court of law would be of opinion

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that cattle belonging to a drover, being put in a ground, with the consent of the occupier, to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent.

Upon the whole, therefore, we are of opinion that judgment should be entered up for the plaintiff upon the defendant's demurrer to the plaintiff's third plea; and that the verdict, not being supported by the facts in evidence, upon any one of the issues, must be set aside, with leave to the plaintiff to put in a plea embracing all the facts in evidence, showing the whole merits of the case, unless the plaintiff should choose to rely upon the judgment in his favor upon the demurrer; in which case he will be permitted to withdraw the pleas upon which the issues of fact have been joined, and take judgment upon the demurrer.

THRUSTON, J., dissented.

 BARRELL v. SIMONTON.

Notice at Washington to defendant's counsel, on Thursday, the 31st of December, that a deposition would be taken in Baltimore on the 2d of January, was not reasonable notice.

Mr. R. S. Coxe, for the defendant, moved the Court for a continuance of the cause until the next term, because a deposition had been taken on the part of the plaintiff, in Baltimore, on Saturday, the 2d of January, upon notice given to the defendant's counsel here in Washington, on Thursday, the 31st of December, at eleven o'clock, A. M.

The COURT (THRUSTON, J., absent,) was of opinion that the notice was not reasonable, and continued the cause.

 UNITED STATES v. CHARITY GRAY, a free Mulatto.

A slave is not a competent witness against a free mulatto not in a state of "servitude by law," in a prosecution for larceny, in Washington county, unless at the discretion of the Court, under the circumstances stated in the Act of Maryland of 1717, c. 13, and then the slave should not be forced or permitted to testify against her mother.

INDICTMENT FOR LARCENY. The prisoner's daughter, who is a slave, was offered as a witness for the United States.

Mr. Key, for the prisoner, objected that a slave is a witness against a slave only, or a free negro or mulatto, "during his servitude by law," and cited the Acts of Maryland of 1717, c. 13, and 1751, c. 14.

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CRANCH, C. J., mentioned the following cases in this Court: *United States v. Nancy Swann*, a free mulatto, at December term, 1803, (1 Cranch, C. C. 148,) where the Court, being of opinion that a slave could not be a witness against her, refused a subpoena for the slave; *United States v. Negro Terry*, at June term, 1806, (1 Cranch, C. C. 318,) where this Court permitted a slave to be sworn for the prisoner; *United States v. William Shorter*, a free negro, at December term, 1806, (1 Cranch, C. C. 315); same point decided on the authority of the case of the *United States v. Terry*, *United States v. Peggy Hill*, a free-born mulatto, December term, 1808, (1 Cranch, C. C. 521.) Mr. Jones, for the United States, offered a slave as a witness. The Court (DUCKETT, J., absent,) having more carefully considered the Acts of Maryland, 1717, c. 13, and 1751, c. 14, § 4, was of opinion that a slave is not a competent witness against a free-born mulatto not under a state of temporary servitude by law. *United States v. Bruce*, a slave, at December term, 1813, (not reported,) where a slave was admitted under the act of 1751, c. 14.

CRANCH, C. J., was of opinion that the slave was not a competent witness.

THRUSTON, J., was of opinion that, under the third section of the Act of 1717, c. 13, the Court, in its discretion, might admit the witness, but that the daughter ought not to be forced or permitted to testify against her mother.

MORSELL, J. was of opinion that the slave was a competent witness against a free negro.

Verdict for the prisoner.

 ZACHARIAH HAZEL v. JOHN WATERS.

If, after setting forth the condition of the bond in the declaration, the plaintiff does not, in the declaration, show a breach of the condition, the mere averment of non-payment of the penalty does not show a cause of action.

THE Court having at December term, 1828, ordered the judgment to be arrested, and a *venire de novo*, (*ante*, 420,) Mr. C. C. Lee, for the plaintiff, moved the Court for a reconsideration of the question of law; and contended, on the authority of the case of *The Mechanics Bank v. Minor*, 1 Peters, 67, that the averment of the non-payment of the penalty is a sufficient breach, after verdict.

Mr. Wallach, *contrà*. The plaintiff has set forth, in his declaration, as a special breach, what is no breach of the condition; and thereby shows that he has no cause of action.

Mr. C. C. Lee, in reply. In the case of *Minor* there was no

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good breach set forth in the declaration, or in the replication; yet the Court said that the averment, in the declaration, of the non-payment of the penalty, shows a good cause of action.

CRANCH, C. J., delivered the opinion of the Court as follows, (THRUSTON, J., absent.)

The Court has again looked into this case, at the request of the plaintiff's counsel, who has referred us to the case of *Minor v. The Mechanics Bank of Alexandria*, 1 Peters, 67, and supposes that the averment in the declaration, that by reason of the breach of the condition of the bond, set forth in the declaration, the plaintiff is entitled to recover the penalty, and that the defendant has not paid the penalty, is a sufficient setting forth of a breach of the condition upon demurrer, although the breach of the condition, as set forth in the declaration, should, of itself, be insufficient.

But that case is not applicable to the present. In that case there was a general plea of performance, and the replication put in issue the whole matter of defence; and the verdict, being general, and for the plaintiff, found the general breach as set forth in the replication. It is true that the Court said, in that case, that the declaration assigned "a good breach, by the non-payment of the penal sum stated in the bond;" but that cannot mean a breach of the condition of the bond, for it was no part of the condition that the penalty should be paid. It is evident that by the word "breach," in that sentence, the judge must have meant a cause of action. The declaration in that case did set forth a good cause of action. It set forth the bond, without its condition, and averred the non-payment of the penalty as the cause of action. In the present case the condition is set forth in the declaration, which shows that no cause of action existed, unless there was a breach of that condition; and if, after setting forth the condition in the declaration, the plaintiff does not, in the declaration, show a breach of the condition, the mere averment of non-payment of the penalty does not show a cause of action.

In *Minor's case*, the judge, in delivering the opinion of the Supreme Court, said — "That in a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being, in point of law, within the scope of the covenant, the defect is fatal, even after verdict."

When the declaration itself sets out the condition of the bond, it is then like a declaration upon a covenant; and the law, as laid down by the judge, is exactly applicable to such a case.

The Court, therefore, is still of the opinion, that the declaration will not support a judgment for the plaintiff.

Judgment arrested.

HENRY ST. GEORGE TUCKER v. HENRY LEE.

In an action upon an appeal-bond, given upon a writ of error to the Supreme Court of the United States, the breach to be assigned must be a single breach, denying each alternative; that is, it must aver that the plaintiff in error did not prosecute his writ to effect, nor make his plea good, nor answer the damages and costs; which damages and costs the plaintiff must specially set forth.

The plaintiff in error is not bound, at all events, to answer the damages adjudged to the defendant in error in the Supreme Court; he is only to indemnify the defendant in error for whatever losses he may have sustained by the judgment's not being satisfied, and paid after affirmance.

The damages and costs must be made to appear, at least, in the allegation of the breach. They are not such as the law implies, but are special damages, which must exist before a cause of action, on the bond, can accrue to the plaintiff.

A plea is bad, which purports to be a plea to the whole declaration, and yet covers only a part.

To an action upon an appeal-bond, setting forth a special breach, it is not a good plea to say that the plaintiff is not damnified by any thing in the condition mentioned. The only design of the general plea of *non damnificatus* is to force the plaintiff to assign a breach of the condition; but when the breach is already specially assigned, the plea must answer that special assignment.

When a condition is in the disjunctive, the defendant must, by his plea, show which part he has performed.

When the plea is not a direct denial of some material fact stated in the declaration, it should conclude with a verification.

In an action upon an appeal-bond, the damages may not be limited to the averment of damages accruing upon affirmance of the judgment, and adjudged by the Supreme Court to the plaintiff, for his delay and his costs.

The Court, upon the issues of fact, refused to instruct the jury, that the plaintiff was not entitled to recover damages for the amount of the original judgment, in a suit upon the bond.

DEBT upon an appeal-bond, given upon the issuing of a writ of error, upon a judgment of this Court, against Peter R. Beverly, in favor of Henry St. George Tucker. The bond was given by the said P. R. Beverly, as principal, and the defendant, Henry Lee, as surety.

The condition of the bond, after reciting the judgment, &c., is as follows — "Now if the said Peter R. Beverly, the plaintiff in error, shall prosecute his writ to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void," &c.

The declaration, after setting forth the bond and its condition, assigns the breach thus:

"And the plaintiff avers that the said P. R. B., plaintiff in the said writ of error, did not prosecute his said writ of error to effect; and that afterwards, that is to say, &c., the said judg-

ment of the Circuit Court was in all things affirmed," as by the record, &c.; "and that the said Peter did not answer the damages and costs of the said Henry to the said Henry adjudged, in the said Supreme Court; and so, the condition of the said writing obligatory the said defendant has not kept, but has wholly broken, whereby action has accrued to the plaintiff to demand and receive from the defendant the said penal sum of \$9,233.92." Nevertheless, &c.

To this declaration there was a general demurrer; and the only question was, whether the breach is sufficiently assigned.

Mr. C. C. Lee, for the defendant, contended that the breach was defective, in not setting forth the amount of the damages claimed; and cited 1 Saund. 58; 2 Saund. 187 a; *Roles v. Rosewell*, cited in *Hardy v. Bern*, 5 T. R. 636; *Minor v. Mechanics Bank*, 1 Peters, 46; 1 Saund. 47; *Hazel v. Waters*, in this Court, (*ante*, 420.)

Mr. J. Dunlop, contra. The declaration sets forth the judgment below, the writ of error, and affirmance, and the breach, in the words of the statute, namely, did not prosecute his writ to effect; and did not pay the damages, &c. Damages means the whole debt and damages,—indemnity. *Brodie v. Catlett*, 9 Wheat. 553. The judgment upon this demurrer, if for the plaintiff, is peremptory. It is as certain as it could be, unless it were to go on and say, to wit, the sum of , and interest, , and costs.

The first breach is, that he did not prosecute his writ with effect. This is sufficient. The damages are set out in the declaration. 1 Chitty, Pleadings, 643; *Roe v. Crutchfield*, 1 H. & M. 361; The Judiciary Act of 1789, § 26, [1 Stat. at Large, 73.]

Mr. Lee, in reply. The only question is, whether it is necessary to set forth a breach of the condition. Saunders is positive. 1 Saund. 58; 2 Saund. 187, 188.

CRANCH, C. J., delivered the opinion of the Court, as follows:

Upon bonds with collateral condition, the plaintiff must, under the statute of 8 & 9 W. 3, c. 11, § 8, assign the breach or breaches upon which he intends to recover. *Hardy v. Bern*, 5 T. R. 636; *Wilmer v. Harris*, 5 Har. & Johns. 1; 1 Saund. 58, n. 1; 2 Saund. 187 a, n. 2. And if he undertakes to set them out in his declaration, they must be as precisely averred as in a replication; and if they are all insufficiently set out, the declaration must be adjudged bad upon demurrer. *T. Jones*, 125; *Rea v. Burnis*, 2 Lev. 124; *Anonymous*, Hardres, 320. But if there be one good breach well set out, the demurrer, if to the whole declaration, must be overruled. *Gordon v. Kennedy*, 2 Binney, 287; 1 Chitty, Pl. 326, n. 1; *Adams v. Willoughby*,

6 Johns. 65. Although if some of the breaches assigned be insufficient, and there should be a general verdict for the plaintiff, the judgment would be arrested. *Fletcher v. Peck*, 6 Cranch, 87.

The counsel for the defendant supposes that the breach assigned in this declaration is insufficient, because it does not set forth specially the damages which the plaintiff has sustained, by reason of the judgment's not being satisfied and paid after the affirmance in the Supreme Court.

The counsel for the plaintiff contends, that there are two breaches assigned in the declaration: namely, that the plaintiff in error "did not prosecute his writ to effect;" "and that he did not answer the damages and costs of the said Henry, to the said Henry adjudged by the said Supreme Court;" and that the first breach is certainly well assigned.

To prosecute his writ to effect, is the same thing as to make his plea good. He was not bound to prosecute his writ to effect, and also to answer all damages and costs; for he could not prosecute his writ to effect, unless he should make his plea good; and if he made his plea good, he is not bound to answer the damages and costs.

The condition of the bond, then, is really alternative; so that if the plaintiff in error either prosecuted his writ to effect, or made his plea good, which is the same thing, or answered all damages and costs, the plaintiff has no cause of action.

The breach to be assigned, therefore, must be a single breach, denying each alternative; that is, it must aver that the plaintiff in error did not prosecute his writ to effect, nor make his plea good, nor answer the damages and costs, which damages and costs the plaintiff must set forth specially; for the plaintiff must have sustained damages and costs, before the condition can be broken by the non-payment of them. The condition is not to "answer the damages and costs of the said Henry to the said Henry adjudged in the Supreme Court," as averred in the declaration. In the case of *Catlett v. Brodie*, 9 Wheat. 554, the Supreme Court says—"It has been supposed, at the argument, that the act meant only to provide for such damages and costs as the court should adjudge for the delay; but our opinion is, that this is not the true interpretation of the language. The word "damages" is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain, by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained, and

for which the bond ought to give good and sufficient security. Upon any suit brought upon such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; for which amount only is the obligee entitled to judgment."

It is clear, then, that, by the condition of this bond, the plaintiff in error is not bound, at all events, to answer the damages adjudged to the defendant in error in the Supreme Court; and yet the breach assigned is, that he has not answered them, and them only. By the decision of the Supreme Court in *Catlett v. Brodie*, he is only to indemnify the defendant in error for whatever losses he may have sustained, by the judgment's not being satisfied and paid after the affirmance. What those losses were is not stated in the declaration, nor can they be judicially ascertained by any allegation therein. It is not even averred that the plaintiff has sustained any loss for which the defendant is bound to indemnify him. If the breach vary from the sense and substance of the contract, and either be more limited, or larger than the covenant, it will be insufficient. 1 Chitty, Pleading, 328. The declaration avers only a single breach, although that breach consists of two negatives; for it was necessary to deny both branches of the alternative condition, in order to show a breach. It is bad, because it avers that the plaintiff has not done what he was not bound to do; and does not deny that he has done what he was bound to do. Before the defendant can be made liable to the penalty of the bond, for not answering the damages and costs, those damages and costs must be made to appear, at least in the allegation of the breach. They are not such as the law implies, and which it is not necessary to state in the declaration, because they are presumptions of law; but they are special damages, which must exist before a cause of action can accrue to the plaintiff.

This idea is strongly stated by Mr. Chitty, Civil Pleadings, 385, 386. "General damages," he says, "are such as the law implies to have accrued from the wrong complained of: special damages are such as really took place, and are not implied by law. It does not appear necessary to state the former description of damages in the declaration, because presumptions of law are not, in general, to be pleaded. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity."

And again in p. 389, he says, "if the action be not sustainable independently of special damage, the declaration would be bad on demurrer, or in arrest of judgment."

The plaintiff in error is not bound absolutely to prosecute his

writ to effect, or to make his plea good; and, therefore, the law does not necessarily imply damages for not doing it. The condition of the bond gives him another alternative, which, as construed by the Supreme Court, is to indemnify him for whatever losses he may sustain by the judgment's not being satisfied after affirmance. These are losses which must arise before the bond can be forfeited; and must, therefore be set out in the breach. The only damages which the law would necessarily imply, in this case, would be the damages for not paying the damages actually contracted to be paid. Whenever the amount of these shall be ascertained, the condition of this bond will be equivalent to a condition to pay that sum of money; and in that case the only damages which the law would imply, would be the damages for the non-payment of that sum.

We are, therefore, of opinion that the breach of the condition of this bond, is not well assigned and that the judgment upon the demurrer ought to be for the defendant.

There is another objection to the assignment of the breach; and that is, that it says "the said Peter did not answer the damages," &c. It might be true that he did not answer the damages and costs on the first day after the affirmance, and yet he might have answered them before the suit brought, so that the plaintiff might not have had a cause of action at the time of bringing the suit. This does not seem to be "certainty to a common intent." However, our opinion is not founded upon this defect.

THRUSTON, J., not having heard the argument, gave no opinion.

The plaintiff had leave to amend his declaration, which he did by striking out the averment "that the said Peter did not answer the damages and costs of the said Henry, to the said Henry adjudged in the said Supreme Court," and inserting the following: "nor did the said Peter R. make his said plea good; nor did he, nor has he the said Peter R., or any other person for him, answered, satisfied, or paid, though often requested by the plaintiff so to do, to wit, the 18th December, 1824, and often before and afterwards, at Washington county aforesaid, the damages and costs sustained by the said plaintiff by the failure of the said Peter R., to prosecute his said writ to effect, to make his said plea good, and to satisfy and pay to the said plaintiff the said recited judgment, so affirmed as aforesaid, in the said Supreme Court, which said damages and costs amount to the sum of \$4,616.96 with interest thereon, from 22d December, 1820, and costs of suit in the said Circuit Court, and costs of suit in the said Supreme Court; but to pay the same or any part thereof, the said Peter R., or any other person for him, hath hitherto refused and still refuses."

The defendant pleaded five pleas in bar. 1. The 1st plea is, "That after signing and sealing of the writing obligatory in the declaration mentioned, and before the commencement of this suit, to wit, on, &c. one William S. Jett and Peter R. Beverly, were held and bound to the plaintiff in a large sum of money, to wit, in the sum of _____ as sureties for one Henry Lee, since departed this life, the said Jett by writing obligatory, and the said Beverly by promissory note, and being thus held and bound to the said plaintiff, he instituted separate suits against the said Jett and Beverly, and recovered judgments against both. That the said Beverly obtained a writ of error, to reverse the said judgment, in and about the obtaining of which writ of error, the writing obligatory, in the declaration mentioned, was sealed and delivered, and after it was so sealed and delivered, and after the commencement of the present action, and before plea pleaded, to wit, on the _____ day of _____ the said William S. Jett, wholly paid and satisfied to the said plaintiff, the said original debt of the said Henry Lee, deceased, of which the said sum of \$4,616.96, in the declaration mentioned, with interest thereon, &c. was part. Wherefore, &c. whether the said plaintiff ought further to have and maintain, &c." To this plea there was a general demurrer.

2. Upon the second plea there was an issue of fact.

3. The third plea is a general *non damnificatus*. To this plea there was a general demurrer.

4. The fourth plea is "that another person, namely, one William S. Jett hath answered, satisfied, and paid to the said plaintiff, the said damages, and of this the said defendant puts himself on the country." To this plea there is a special demurrer.

1st. Because it concludes to the country, when it ought to conclude with a verification.

2d. Because, if good, it amounts to a plea of payment, and ought to have been so pleaded.

CRANCH, C. J., in delivering the opinion of the Court said, as to the first plea; The words "after the signing and sealing of the said writing obligatory, in the declaration mentioned and," may be rejected as surplusage, for they are not at all necessary to the validity of the plea. But the plea is bad because it purports to be a plea to the whole declaration and yet covers only a part. The damages alleged in the declaration, the non-payment of which constitutes the breach assigned, consists not only of the \$4,616.96 with interest from the 22d of December, 1820, till paid, but of the costs of suit in the Circuit Court, and in the Supreme Court. The plea does not state the payment of that part of the damages which consists of those costs. It only

avers the payment of the whole original debt due by H. Lee, the elder, to Tucker, of which those costs did not constitute a part. It does not aver that the payment made by Jett to Tucker, was made for or on account of Beverly; nor that it was made or received in discharge of the judgment of Tucker against Beverly; nor in full of the damages, which plaintiff is entitled to recover under the bond upon which this action is founded. The plea does not expressly aver that any debt was ever due by H. Lee, the elder, to Tucker; nor that Jett and Beverly were bound to Tucker for any debt due to him by the said Lee. It only avers that they were bound to the plaintiff as "securities" for the said Lee, but for what object or purpose does not appear. It does not aver that they were jointly bound, nor bound at the same time, nor that each was bound for the whole; so that it does not appear what right Jett had to pay for Beverly, or what right Beverly had to appropriate to himself the payment made to Jett. Jett may have originally been sole surety for Lee to Tucker, and Beverly may have come in afterward to release Jett. They might have been not simultaneous, but successive sureties. These are possibilities which are left open by the plea, and show that there is not enough stated in the plea to give Beverly a right to avail himself of the payment made by Jett. But if he could, or even if Beverly himself had paid the original debt and interest due by Lee to Tucker, it would be no answer to the present action so long as the judgment against Beverly remained unsatisfied; it would be only matter of argument to show that the plaintiff had sustained no damage covered by the bond upon which this suit is brought.

We are, therefore, of opinion that upon this demurrer the judgment ought to be for the plaintiff.

The 3d plea is a general *non damnificatus*; that is, "That from the time of making the bond to the day of the commencement of this action, the plaintiff was not damnified by reason of any thing in the condition of the said writing obligatory mentioned; and this the defendant is ready to verify, &c." The plea does not state that the plaintiff was not damnified by any thing in the declaration alleged; nor in manner and form as the plaintiff has averred in his declaration. If he had done so, it would have been a direct denial of the gist of the count, and ought to have concluded to the country, and not with a verification.

The plea, perhaps, might have been good, if the condition of the bond, and a special breach of that condition, had not been set forth in the declaration. But it is now no answer to the declaration setting forth such a breach, to say that the plaintiff

is not damnified by reason of any thing in the condition mentioned.

The general forms of the plea of *non damnificatus* given in 2 Chitty, 480, 481, are to declarations in which no particular breach, nor any particular damages are set forth. So also is the plea in *Cutler v. Southern*, in 1 Saund. 116. This general way of pleading is bad upon special demurrer, even to a declaration for non-payment of the penalty. 1 Saund. 116, note 1. And there is no case where it has been permitted after the assignment of a special breach; for the only design of the general plea of *non damnificatus* is to force the plaintiff to assign a breach of the condition; but when the breach is specially assigned, the plea must answer the special assignment. Williams, in his note to 1 Saund. 116, says, "but in all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*; and if there be any damage the plaintiff must reply it." This shows that the general plea is to precede, not to follow the special assignment.

But the condition of this bond is, in effect, in the disjunctive. It is to prosecute his writ to effect, (that is, to make his plea good,) and if he fail to make his plea good, to answer all damages and costs; and whenever the condition is in the disjunctive, the defendant must, by his plea, show which he has performed. Co. Lit. 303, b.

We are, therefore, of opinion that this third plea is bad, to this declaration; and that the judgment, upon this demurrer also, ought to be for the plaintiff.

The fourth plea is, "that another person, to wit, one William S. Jett, hath answered, satisfied, and paid, to the said plaintiff, the said damages, and of this the said defendant puts himself on the country."

To this plea there is a special demurrer. 1st. Because it concludes to the country when it ought to conclude with a verification. 2d. Because, if good, it amounts to the plea of payment, and ought to have been so pleaded.

This plea concludes to the country, as if it were a direct denial of a material allegation in the declaration. The averment, to which it purports to be an answer, is, "nor did he, nor has he, the said Peter R., or any other person for him, answered, satisfied, or paid, though often requested," "the damages and costs sustained by the plaintiff," &c.

The plea does not say that the said Jett paid the damages for the said Beverly, or at his request; nor does it state any facts which show a right in Jett to pay the damages for Beverly, or any right in Beverly to claim the benefit of that payment.

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The plea is not a denial of any material fact averred in the declaration, and, therefore, ought not to have concluded to the country. It is therefore bad on general and special demurrer.

The Court is of opinion that the judgment upon this demurrer ought also to be for the plaintiff.

At a subsequent term, upon the trial of the issues of fact joined upon the second and fifth pleas, the plaintiff read in evidence to the jury the bond and condition upon which the action was founded, and offered no other evidence; but claimed damages to the amount of the original judgment recited in the said condition, with the damages and costs awarded in the Supreme Court, on the affirmance of the said judgment as stated in the declaration; whereupon the counsel for the defendant, *Mr. Lee* and *Mr. Jones*, prayed the Court to instruct the jury, that upon the evidence aforesaid the plaintiff was not entitled to recover damages beyond the amount of damages accruing upon the affirmance of the judgment in the said condition mentioned, and adjudged by the Supreme Court, upon such affirmance, to the plaintiff, for his delay, with the costs adjudged to the plaintiff by the Supreme Court on such affirmance."

But the COURT (*nem. con.*) refused to give the instruction.

Whereupon the defendant prayed the Court to instruct the jury, "that the condition of the said bond does not bind the defendant to pay the original judgment in the said condition recited, at all events in case of affirmance, but only such losses or damages as the plaintiff shall show he has actually sustained by means of the writ of error in the said condition mentioned; and that the plaintiff is not entitled to recover damages in this case upon the evidence aforesaid, for the amount of the said original judgment, in addition to the damages and costs so adjudged by the Supreme Court as aforesaid, as of course; but only for such further losses or damages as he shall, by substantive evidence, show that he has actually sustained by reason of the said writ of error. That the evidence so as aforesaid produced by the plaintiff is not, of itself, and without any other evidence of loss or damage, sufficient to authorize the jury to include in the amount of the damages to be assessed in this case, the amount of the original judgment recited in the said condition to have been recovered by the plaintiff against the said Beverly, in the Circuit Court of the District of Columbia for the county of Alexandria;" which instruction, also, the Court refused to give, being of opinion that upon the issues of fact joined in this cause, the burden of proof is *primâ facie* upon the defendant.

Verdict for the plaintiff, for the whole amount of the judgment recited in the condition of the bond, and costs.

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The defendant took bills of exception, but did not prosecute a writ of error.

THOMAS TINGEY, for the use of the United States, v. DANIEL CARROLL AND WM. BRENT.

In an action of debt against Daniel Carroll and William Brent, survivors of Charles Carroll and Eli Williams, upon articles of agreement, and averring the articles to be "sealed with the seals of the said Williams and Carrolls, and the said William Brent;" if on profert and oyer the articles appear to be signed and sealed thus: "Williams & Carrolls, (seal,)" "Wm. Brent, (seal,)" "Thomas Tingey, (seal,)" the variance is fatal on general demurrer.

One joint contractor cannot bind the others by seal.

There cannot be a joint seal for divers persons not incorporated.

THE case was argued by *Mr. Swann*, for the plaintiff, and by *Mr. Tabbs*, for the defendants, who cited *Horner v. Moore*, 5 Burr. 2604; *Skinner v. Dayton*, 19 Johnson, R. 513; *Gordon v. Austin*, 4 T. R. 611; *Cabell v. Vaughan*, 1 Saund. 291; *Longmore v. Rogers*, Willes, 288; *Tidd*, 527; 1 Chitty, 643.

Mr. Swann contended, that if every member of a firm be present, and one seals for all, it is the deed of all; but he cited no authority to that point.

CRANCH, C. J. This is an action of debt for \$5,000, the penalty of articles of agreement between Thomas Tingey, in behalf of the United States, on one part, and the defendants and others, on the other part.

The declaration states that Daniel Carroll, of Duddington, and Wm. Brent, surviving obligors of Eli Williams and Charles Carroll, now deceased, and the said Daniel Carroll and William Brent, were summoned to answer to Thomas Tingey, for account of the Navy Department of the United States, of a plea that they render to him 5,000 dollars, which to him, as agent aforesaid, they owe, and from him unjustly detain, &c.

Whereupon the said T. T., by T. S. his attorney, complains, that whereas on the 29th of June, 1812, at the county of Washington aforesaid, certain articles of agreement were made and entered into between the said T. T., Commandant of the Navy-Yard, Washington, for and on behalf of the Navy Department of the United States on the one part, and the said Eli Williams, Charles Carroll, and Daniel Carroll, then acting under the name and firm of Williams & Carrolls, and the said Wm. Brent, of the other part, which said articles witnessed, That the said Williams & Carrolls and the said William Brent had thereby firmly and duly contracted with the said T. T., &c. &c. For the true and faithful performance of which the said Williams

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& Carrolls and the said William Brent did thereby bind themselves jointly and severally to the said T. T., for account of the said Navy Department, in the full and penal sum of 5,000 dollars, &c., which said articles of agreement, sealed with the seals of the said Williams & Carrolls and the said William Brent, the said plaintiff brings here into court, &c.

After oyer the defendants demurred to the declaration.

The articles of agreement were "made and entered into between Thomas Tingey, Commandant of the Navy-Yard, Washington, for and on behalf of the Navy Department of the United States on the one part, and Messrs. Williams & Carrolls and William Brent, all of the county of Washington, in the District of Columbia, on the other part." "For the true and full performance of which, the said Messrs. Williams & Carrolls and William Brent" "jointly and severally bound themselves," &c. "Signed, sealed, and delivered, the day and year first above written.

"Witnesses present:	"WILLIAMS & CARROLLS, (seal,)"
"B. H. TOMLINSON,	"WM. BRENT, (seal,)"
"MORD. BOOTH."	"THOS. TINGEY, (seal,)"

In support of the demurrer it is said, that the instrument produced upon oyer is not such an one as is set forth in the declaration, because it is not sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Carroll of Duddington, and that such variance is fatal on general demurrer.

On the part of the plaintiff, it is suggested that demurrer is not the proper remedy for the defendants, but that the plea should have been *non est factum*; because upon that plea the plaintiff might perhaps prove that Eli Williams, Charles Carroll, and Daniel Carroll, were all present at the sealing, and that each acknowledged the one seal as his, and delivered the instrument as his act and deed; in which case it is supposed that the allegation would be supported that the instrument was "sealed with the seals of the said Williams & Carrolls;" and that the Court cannot now, upon the face of the instrument, say that it is not so sealed, and therefore cannot say that there is a variance between it and the instrument averred in the declaration.

The books are full of authorities, that if the instrument produced upon oyer be not such as is set forth in the declaration, the variance is fatal on demurrer.

Thus in the case of *Cooke v. Graham*, 3 Cranch, 229, the plaintiff demurred specially to the plea of the defendant. The Supreme Court adjudged the plea to be good. But as, upon demurrer, whether general or special, by either party, the court must look into the whole record, and give judgment against

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him who, in pleading, has committed the first substantial fault, they discovered that the declaration was on a bond dated on the 3d of January, but the bond produced on oyer was dated on the 3d of October, and adjudged the error to be fatal, and reversed the judgment. In that case it might have been said, as it is said here, that if *non est factum* had been pleaded, the plaintiff might have shown that the bond, although dated on the 3d of January, might have been delivered on the 3d of October, which might then have been called the date of the obligation, and would have supported the issue on the part of the plaintiff, upon the plea of *non est factum*. But the court said that the objection was fatal upon demurrer, and they decided against the plaintiff on his own special demurrer.

The question then arises, is there a substantial variance between the instrument alleged in the declaration, and that produced upon oyer.

The declaration avers that the defendants, Daniel Carroll and William Brent, are the survivors of the four contractors, Eli Williams, Charles Carroll, Daniel Carroll, and William Brent; and that the agreement was made between Thomas Tingey, of the one part, and the three first-named contractors, "acting under the name and firm of Williams & Carrolls, and the said William Brent, of the other part;" and it makes a profert of "articles of agreement, sealed with the seals of the said Williams & Carrolls, and the said Brent."

In the instrument produced, the Christian names of the three first-named contractors are not mentioned, nor does it therein appear who Messrs. Williams & Carrolls were; nor is it stated therein that they constituted a mercantile house or firm, or acted as a firm or copartners. It is signed,

Williams & Carrolls, (seal.)

William Brent, (seal.)

The witnesses did not certify that it was signed, sealed, or delivered. They merely say that they were present.

The averment, in the declaration, that the agreement was "sealed with the seals of the said Williams & Carrolls," must mean, either that it was sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Carroll, or that it was sealed with the seal of the firm of the said Williams & Carrolls, or with a joint seal of Eli Williams, Charles Carroll, and Daniel Carroll.

If it be an averment that it was sealed with the seals of Eli Williams, Charles Carroll, and Daniel Carroll, it is evident that the averment is not true; for there is but one seal, where, upon that supposition, there ought to be three; nor does the instru-

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ment purport, on its face, to be severally sealed by those three gentlemen. It purports to be the joint signature and seal of whoever may be known under the appellation of "Messrs. Williams & Carrolls." If it be an averment that it was sealed with the seal of the firm of Williams & Carrolls, or with the joint seal of Eli Williams, Charles Carroll, and Daniel Carroll, then it was not the deed of the three; because there cannot, at common law, be a seal of a firm, or a joint seal for any number of persons not incorporated; and, therefore, if such be the averment, the declaration, upon its face, would have been bad without oyer. If the other be the meaning of the averment, then it is not true upon oyer, and the declaration is bad, for the variance.

The question now is, not whether the defendants did or did not enter into a contract, but whether the instrument produced be such an one as is described in the declaration; that is, sealed with the seals of the said Eli Williams, Charles Carroll, and Daniel Carroll; for no lawyer will venture to say, that there is any such thing known to the law as a seal of a firm, or a joint seal of several persons not incorporated; and a declaration setting forth an instrument under such a seal, would be bad on its face.

That one partner of a mercantile house, or firm, cannot bind the other partners by deed, is a rule of law long since established; and in the case of *Harrison v. Jackson, Sykes, and Rushforth*, 7 T. R. 207, Lord Kenyon, C. J., says—"I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject. The parties came to *Nisi Prius* with the facts admitted on both sides; for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted that one partner might bind the rest. But the power of binding each other by deed is now, for the first time, insisted on, except in the *Nisi Prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety."

That case, of *Harrison v. Jackson, Sykes, and Rushworth*, was covenant upon an instrument, averred in the declaration to have been sealed with the seal of W. Sykes, for himself and the other two defendants, who were not present at its execution; and the subject of it was a partnership transaction. There it was not necessary nor proper to demur for variance upon oyer; because the instrument produced corresponded with that stated in the declaration. The plea was *non est factum*; and judgment was

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rendered for the defendants. The counsel, in that case, cited Perkins, § 134, who says — “ One piece of wax may serve for all the grantors, if every one put his seal on the same piece of wax, or another do so for them.” But that other must have authority, and must put the seals there. He also cited the case of *Mears v. Serocold*, which is the *Nisi Prius* case alluded to by Lord Kenyon, in *Harrison v. Jackson and others*. He cited also the case of *Ball v. Dunsterville et al.* 4 T. R. 313. But that was a deed sealed by one of the defendants, for and in behalf of himself and the other, and so executed and delivered by the authority and in the presence of that other. In giving judgment for the plaintiff, the court relied principally upon that circumstance, and said that “ no particular mode of delivery was necessary ; for that it was sufficient if the party, executing the deed, treated it as his own.”

In the case of *Clement v. Brush*, 3 Johns. Cases, 180, (1802,) the Supreme Court of New York decided that one partner cannot bind his copartner by seal ; and that a single bill, concluding, “ as witness our hands and seals, Brush & Howell, (seal,)” and written, signed, and sealed by Brush, was the proper debt of Brush alone. So in the case of *Green v. Beals*, 2 Caines, N. Y. Term Reports, 254, Judge Livingston, in delivering the opinion of the Court, said — “ It is settled in England (7 D. & E. 207,) notwithstanding an opinion of Lord Mansfield, at *Nisi Prius*, to the contrary, that one partner, in consequence of the general authority derived from the articles of copartnership, cannot execute deeds for the other. Were it otherwise, they would be enabled to dispose of the real property of each other, and to create liens on it without end. This would render such connections more dangerous than they already are, if not discourage them altogether. There can be no doubt, therefore, that on the plea of *non est factum* a verdict must have been found for the defendants.”

So also in the case of *Skinner v. Dayton*, 19 Johns. 513, 531, Judge Platt said — “ If the associates are considered as partners, one of them could not bind his copartners by a seal, without special authority ; and admitting that, as a partner, the appellant might, in this instance, have made a contract, without seal, which would have bound all the associates, yet, as he used a seal, the simple contract, as partners, was merged in the covenant ; and thereby it became, in judgment of law, his own individual contract, unless he could prove that his associates specially authorized him to seal for them.”

Again, in p. 533, he says — “ By executing that contract,

Beeding v. Thompson.

Skinner neither created any obligation, nor gave any right of action against any person but himself."

Judge Yates, in the same case, p. 546, says — "It is undoubtedly settled law, that one person cannot seal for another without express authority; and that, by assuming to act without it, a personal obligation is created. That authority may, however, in some cases be by parol; as in the case of *Ball v. Dunsterville*, 4 T. R. 313."

In the present case, there is no averment in the declaration that the seal, opposite the names of Williams and Carrolls, was put there by either of the partners, for himself and his copartners, by their authority. If there had been such an averment, there would have been, perhaps, no variance. *United States v. Spaulding*, 2 Mason, 478. But when the declaration avers the instrument to be under the seals of Eli Williams, Charles Carroll, and Daniel Carroll, and no such seals are found upon it, nor their names mentioned in it, it is impossible, in my opinion, to say that there is no variance.

Being, therefore, of opinion, that if the averment in the declaration is to be understood as an averment that the articles of agreement were under the seal of the firm of Williams & Carrolls, or under the joint seal of Eli Williams, Charles Carroll, and Daniel Carroll, the declaration is bad on its face, because there cannot be, in law, any such seal. And that if it is taken to be an averment that the articles were under the seals of Eli Williams, Charles Carroll, and Daniel Carroll, there is, upon oyer, a fatal variance between the instrument declared upon and that which is produced.

I think, therefore, that the judgment upon the demurrer ought to be rendered for the defendants.

MORSELL, J., concurred in the result of this opinion, but not exactly for the same reasons.

THRUSTON, J., dissented.

The plaintiff had leave to amend, but the Attorney of the United States dismissed the suit.

BEEDING v. THORNTON.

A note made "negotiable" at the Bank of Washington is not a note "payable" at that bank, and it is not necessary to demand payment there, in order to charge the indorser.

AFTER verdict for the plaintiff, in an action by the indorsee, against the indorser of a promissory note, which in the body of

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it stated it to be "negotiable" at the Bank of Washington, the defendant's counsel, *Mr. C. C. Lee*, moved in arrest of judgment, and assigned as the ground of the motion, that the note was made upon its face, payable at the Bank of Washington, and that the declaration did not aver a demand of payment at that bank, and contended that the word "negotiable" meant payable, and that when a note is payable at any particular place, a demand of payment at that place, must be averred and proved in order to charge an indorser. *Bank of United States v. Smith*, 11 Wheat. 175.

But the COURT, *nem. con.* overruled the motion, being of opinion that "negotiable" did not mean payable. *Mr. R. P. Dunlop*, for the plaintiff.

MATTHEW'S LESSEE v. RAE, HAYMAN, AND LIPSICUM.

An alien could not become a citizen of the United States, or of either of the States, in the year 1793, by taking the oaths, and otherwise complying with the requisitions of the naturalization laws of any one of the States.

An alien, as such, has a right, under the 6th section of the Maryland act of December 19, 1791, "concerning the territory of Columbia," &c. to purchase and hold lands in the county of Washington, D. C., and transmit the same to his alien heirs.

EJECTMENT for lots in Georgetown, D. C. The plaintiff's lessors were aliens and claimed as heirs at law of James Redman, who was born in England, came to this county in 1793, and went through the forms of naturalization prescribed by the laws of Pennsylvania, passed in 1789, and by the law of Maryland, passed in 1779. Congress had passed a general naturalization law in the year 1790.

The COURT, (THRUSTON, J., absent) was of opinion that Redman was not naturalized; the State naturalization laws being superseded, and annulled by the Act of Congress, whose jurisdiction upon that subject is, under the Constitution of the United States, exclusive; (*Chirac v. Chirac*, 2 Wheat. 261,) and that, according to the case of *Spratt v. Spratt*, 1 Peters, 343, the plaintiffs, although aliens, were entitled to recover.

INDEX.

ACCOUNT.

1. When the accounts of the parties, in an action at law, are referred by the Court to an auditor, the party excepting to the report will have the same benefit, at the trial of the issue, to the extent of his exceptions, as he would have had if he had formally pleaded or demurred before the auditor according to the English forms of proceeding in actions of account. What is not excepted to will be considered as admitted. The auditor's report is of no avail but to ascertain the points really litigated by the parties. The Court will permit only so much of the report to be read to the jury as states the items claimed by either party and objected to by the other, so as to show what is litigated by the parties. *Barry v. Barry*, 120.
2. Items of partnership account cannot be recovered, in a suit at law, by one partner against the other, if the joint concerns have not been settled. The accounts current rendered by each to the other are admissible in evidence to show, by the admissions of the parties, that the items are not items of partnership account. *Ibid.*
3. In an action upon an open account, the plaintiff may give evidence of any item of which the defendant has had reasonable notice; and the exhibiting and filing a claim for a particular item before the auditor will be considered as reasonable notice of such claim. *Ibid.*
4. The proceedings in equity, in a cause in which the present plaintiff and defendant are parties, may be read in evidence, to show that the defendant had charged to another account some of the articles charged against the plaintiff in the present action. *Ibid.*
5. If an account current be received and kept without objection, except as to particular items, the person so receiving it may still surcharge and falsify as to other items. *Ibid.*
6. If an account be received and not objected to for several years, the jury may infer that it is correct. *White v. Macon*, 250.
7. If one of the counts be "for matters properly chargeable in account according to the account therewith filed," according to the Maryland practice; and there be no account filed, and *non assumpsit* be pleaded to all the counts, the plaintiff may give evidence upon that count, the defendant having, by his plea, waived the objection to the same. *Semmes v. Lee*, 439.

ADMINISTRATION.

1. In an action upon the administration bond to recover a distributive share of the estate, the administrator may retain for necessities furnished to the distributee. *United States v. Ritter*, 61.
2. In a declaration by an administrator upon a bond to his intestate, he must aver himself to be administrator, and make profert of his letters of administration. *Fugate v. Bronaugh*, 65.
3. The Orphans' Court for the county of Alexandria has no authority to order the marshal of the District of Columbia to administer the estate of any deceased person; nor is the marshal bound to obey any such order; he is not a county or corporation officer. He has the powers of a sheriff in executing the laws of the United States, but is not bound to perform all the duties of a sheriff under the State laws. *Ex parte Tench Ringgold*, 86.
4. The plaintiff is bound to give oyer of his letters of administration whenever demanded, before the expiration of the rule to plead. *North v. Clark*, 93.
5. An action cannot be maintained, in Washington county, upon the administration bond of an executor, for not giving in a claim against himself, until the claim

ADMINISTRATION, (*Continued.*)

- has been established by the Orphans' Court, according to the Maryland testamentary law of 1798, ch. 101, c. 8, § 20. *United States v. Rose*, 174.
6. Upon the trial of the issue upon *non assumpsit* in an action by an administrator, he need not produce his letters of administration. *Wise v. Getty*, 292.
 7. If a debt due by an executor to his testator be not barred by the statute of limitations at the time of the death of the testator, the executor is bound to give in the claim in the list of debts; and the statute of limitations ceases to run in favor of the debtor from the time of his accepting the trust as executor. *Wilson v. Rose*, 371.
 8. The act of Maryland, 1720, ch. 24, respecting suits upon administration bonds before the return of *non est* or *nulla bona* against the executor or administrator, is in force in the county of Washington, D. C. *United States v. Queen*, 420.

AGREEMENT.

In an action of debt against Daniel Carroll and William Brent, survivors of Charles Carroll and Elie Williams, upon articles of agreement, and averring the articles to be "sealed with the seals of the said Williams and Carrolls and the said William Brent," if, on profert and oyer, the articles appear to be signed and sealed thus, "Williams and Carrolls, (seal,)" "Wm. Brent, (seal,)" "Thos. Tingey, (seal,)" the variance is fatal on general demurrer. One joint contractor cannot bind the others by seal. There cannot be a joint seal for divers persons not incorporated. *Tingey v. Carroll et al.* 693.

ALIENAGE.

1. An alien could not become a citizen of the United States, or of either of the States, in the year 1793, by taking the oaths, and otherwise complying with the requisitions of the naturalization laws of any one of the States. *Matthews v. Rae et al.* 699.
2. An alien, as such, has a right under the sixth section of the Maryland Act of December 19, 1791, "concerning the Territory of Columbia," &c., to purchase and hold lands in the county of Washington, D. C., and transmit the same to his alien heirs. *Ibid.*

AMENDMENT.

1. When some of the defendants have been taken, and others not arrested, the plaintiff may amend his declaration, at the trial term, in that respect, as a matter of right, and such amendment will not authorize the defendants to plead the statute of limitations. *Bell v. Davis et al.* 4.
2. If the defendant reads the credit side of the account filed by the plaintiff as part of his declaration, he thereby makes the whole account evidence for the plaintiff. *Ibid.*
3. Upon leave given to the defendant to amend his pleadings in an action for a libel, the Court will not receive pleas in justification which do not contain a justification of what they profess to justify. *Kerr v. Force*, 8.
4. If, by mistake of the clerk, the judgment be entered against the defendant by a wrong name, (William instead of Samuel,) the Court will order the judgment to be rescinded, and the continuances to be entered up, and the proceedings corrected, under the Maryland law. *Bank of United States v. McKenney*, 173.
5. After the jury is sworn, the Court will not suffer the plaintiff to amend, if the justice of the case be against him. *Clarke v. Mayfield*, 353.
6. A *scire facias* to revive a judgment on confession, for damages only, in an action of debt, cannot be amended if it be conformable to the judgment; nor can the judgment be amended upon *nul tiel record*, in *scire facias*. *Brown v. Gilles*, 363.
7. If, upon leave to amend, the plaintiff add a count upon a cause of action which could not be given in evidence upon the original declaration as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged. *Hyer et al. v. Smith*, 437.
8. A petition for freedom is an action *quasi in formâ pauperis*, and the Court ought to see that the petitioner is not entrapped in the subtleties of special pleading; and for that purpose will permit repeated amendments, especially after the other party has amended his pleadings. *Negro Thomas Butler v. Duvall*, 611.

AMENDMENT, (Continued.)

9. The return of a *scire facias* against terre-tenants may be amended. *Mandeville v. McDonald et al.* 631.
10. The Court will not, at the trial, permit the defendant to amend his pleadings, unless they are satisfied of the justice of the defence intended to be made by the new pleas. *Allen v. Magruder*, 6.

APPEAL.

1. No appeal lies from the judgment of a justice of the peace, unless the "debt or demand" exceed the sum of five dollars. *Thornton v. Corporation of Washington*, 212.
2. In a jury-trial before a justice of the peace, there is no mode in which the law of the case can be brought before the Circuit Court, separated from the question of fact. *Denny v. Queen*, 217.
3. Upon a jury-trial before a justice of the peace, under the Act of Congress of March 1, 1823, "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," the justice is not bound to sign a bill of exceptions, as no writ of error or appeal will lie in such a case. *Smith v. Chase*, 348.

4. In an action upon an appeal-bond given upon a writ of error to the Supreme Court of the United States, the breach to be assigned must be a single breach denying each alternative; that is, it must aver that the plaintiff in error did not prosecute his writ to effect, nor make his plea good, nor answer the damages and costs; which damages and costs the plaintiff must specially set forth.

The plaintiff in error is not bound at all events to answer the damages adjudged to the defendant in error in the Supreme Court; he is only to indemnify the defendant in error for whatever losses he may have sustained by the judgment's not being satisfied and paid after affirmance. The damages and costs must be made to appear, at least in the allegation of the breach. They are not such as the law implies, but are special damages which must exist before a cause of action upon the bond can accrue to the plaintiff. *Tucker v. Lee*, 684.

5. To an action upon an appeal bond, setting forth a special breach, it is not a good plea to say that the plaintiff is not damaged by any thing in the condition mentioned. The only design of the general plea of *non damnificatus* is to force the plaintiff to assign a breach of the condition; but when the breach is already specially assigned, the plea must answer the special assignment. *Ibid.*
6. In an action upon an appeal-bond the damages may not be limited to the amount of damages accruing upon affirmance of the judgment, and adjudged by the Supreme Court to the plaintiff for his delay and his costs.

The Court refused to instruct the jury that the plaintiff was not entitled to recover damages for the amount of the original judgment in a suit upon the bond. *Ibid.*

7. An appeal from the Orphans' Court, in Washington county, D. C., will be dismissed, if the transcript of the record be not transmitted to this Court, within thirty days after the order appealed from. *Mauro et al. v. Ritchie*, 147.
8. The Orphans' Court has a right to review its sentence, although thirty days shall have elapsed, and the party shall have lost his right of appeal from the original sentence; and from the judgment of the Orphans' Court upon that review an appeal lies to this Court. *Ibid.*
9. The difference between a rehearing and a review is, that a rehearing may be had before enrolment of the decree; but after enrolment the party is put to his bill of review.

A petition for a review, in the Orphans' Court, is analogous to a bill of review in Chancery.

A judgment of the Orphans' Court against the petitioner upon demurrer to the petition for review is, in effect, a judgment that the errors suggested in the petition for review as apparent on the record, were not such as ought to have induced the Orphans' Court to reverse its decree; and from this judgment of the Orphans' Court, the party may appeal to this Court. *Ibid.*

APPRENTICE.

1. Under the Maryland Act of 1793, c. 45, § 6, a mechanic may take as an apprentice any male child until he arrive at the age of 21 years; and an indenture made by one justice of the peace only, for five years' service of the boy was,

APPRENTICE, (*Continued.*)

- under the 7th section of the act, enforced by the Court, after the boy had been some time with the master, (who was a tailor,) and was able to earn \$8 or \$9 a week by working at the trade; although one justice of the peace had no authority so to bind him, and although the age of the boy was not specified in the indenture; and although the indenture was not seen by the Orphans' Court, nor recorded; nor signed by the boy or his mother, who was his only living parent, nor was her approbation thereof notified by an indorsement on the same. *Charles v. Matlock*, 230.
2. Two justices of the peace cannot bind out an apprentice in Washington county, while the Orphans' Court is in session. *May v. Bayne*, 335; *Lynch v. Ashton*, 367.
 3. It is only where there is a contract in part executed, that the Court can compel the parties to execute it in an equitable manner under the 7th section of the Maryland Act of 1793, c. 45. *Lynch v. Ashton*, 367.
 4. The father, with the consent of his son, 15 years old, bound him to Glenn as an apprentice. The son signed and sealed the indentures, but was not named as a party therein, nor was there any covenant on his part. The Court refused to discharge him. *Studer v. Glenn*, 650.

ARBITRATION.

When the condition of an arbitration bond is to abide by the award of J. P. and S. B., and a third person to be chosen by them in case they should not agree upon an award; the award need not state why it is signed by the three arbitrators, nor that the third person was appointed in writing; nor that the two named had disagreed before they appointed the third. *Frye v. Scott*, 294.

ARREST.

A recommitment of a debtor upon a *ca. sa.* after he has been out for more than a year on a prison-bonds bond, is not a breach of his privilege as a witness, and party bound to attend Court. *Ex parte A. T. F. Bill*, 117.

ASSAULT.

Cocking and raising a gun, and threatening to shoot a person, is an assault in law, although there should be no attempt to shoot or injure the person. *United States v. Kierman*, 435.

ASSETS.

1. If a deed of trust for the benefit of children be set aside by a decree in equity, as being fraudulent as to creditors, and the trustee, who is also executor of the grantor be decreed to sell and pay the creditors out of the proceeds of the trust property; those proceeds are assets, as to the creditors, and the money paid to them is money paid by the executor, and may be recovered by him as executor from the person for whose use he paid it. *Lynn v. Yeaton*, 182.
2. The proceeds of sale of an equitable title to land are equitable, not legal, assets. *Law v. Law*, 324.

ATTACHMENT.

1. An assignment of the debt by the defendant to a third person, (with notice to the garnishee,) before service of the attachment, cannot be given in evidence upon trial of the issue *nulla bona*, but must be pleaded specially. *Baker v. Mix*, 1.
2. The oath to obtain an attachment under the Maryland Act of 1795, ch. 56, may be made by one of the copartners, and need not state that he is the acting partner, nor that the other partners were absent. *Drake v. Cleveland*, 3.
3. An attachment for not answering a bill in equity need not be made returnable to the Rules, but may be issued by the Court returnable immediately to the Court. *Dowson et al. v. Packard*, 66.
4. An attachment of contempt will lie against a master who attempts to remove his slave out of the jurisdiction of the Court after he has notice or knowledge of the slave's petition for freedom; and the Court will also order the slave to be brought into Court by the marshal, that he may be protected. *Negro Richard v. Van Meter*, 214.
5. If a replevin be discontinued, the defendant is not guilty of contempt in taking possession of the goods, they being no longer in the custody of the law. *Mitchell v. Wilson*, 242.

ATTACHMENT, (Continued.)

6. A mere equitable interest in lands is not liable to attachment and condemnation by way of execution under the Maryland law of 1715, c. 40. *Sawyer v. Morté*, 331.
7. The marshal is not entitled to poundage upon the money and bank-notes of the defendant not taken into his actual custody so as to make him chargeable therefor. *Ringgold v. Lewis*, 367.
8. If goods be attached under the Maryland law of 1795, c. 56, and the defendant be taken on the *capias* before the return of the attachment, it will be dissolved upon the personal appearance of the defendant in custody. *Cox v. Watkins*, 629.

ATTORNEY.

1. If there be two joint trustees with a joint power of attorney to sell; the trust cannot be executed by one alone, either in the lifetime of the other, or after his death.
Upon the death of one, the trust does not survive to the other, unless such a provision be inserted in the deed of trust. *Boone v. Clarke*, 389.
2. A power of attorney becomes invalid by the death of the principal, except so far as the attorney has an interest coupled with the power. *Ibid*.

AUCTIONEER.

1. The act of Virginia of 1796, "concerning corporations" which requires bond and security to be given by auctioneers, does not prescribe the condition of the bond, but leaves it to the discretion of the respective corporations; but when the condition has been fixed by a by-law, it cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law. *Fowle v. Corporation of Alexandria*, 70.
2. The auctioneer is bound by the instructions of the owners.
If the price be limited, his duty is to set the goods up at that price. If they will not sell at the price limited, he must not sell; and if the goods perish because they cannot be sold at that price, the loss must fall upon the owner. *Williams v. Poor*, 251.

AUDITOR.

1. See **ACCOUNT**, 1, 2, 3, 4. *Barry v. Barry*, 120.
2. The report of the auditor under the Maryland Act of 1785, c. 80, is *prima facie* evidence of the amount due upon the principles and evidence stated in the report; and if those principles and that evidence are approved by the Court, so much of the report may be read to the jury as shows the balance so stated; although before the jury is sworn the defendant except to the evidence admitted by the auditor, and to his calculations, conclusions, and statements. *Bank of United States v. Williams*, 240.
3. Upon trial before a jury in an action at law, the report of the auditor to whom the cause had been referred under the Maryland Act of 1785, c. 8, § 12, to state the account of the parties, is *prima facie* evidence of the balance due, if the principles upon which the account is stated are correct, and the evidence properly received by the auditor.
An account rendered by the defendant to the plaintiff, is proper evidence for the plaintiff before the auditor. *Bank of United States v. Johnson*, 228.

AVERAGE.

1. The charges of entering a harbor for repairs, the surveyor's bill and port charges are items of general average, and are the subject of general contribution. *Vowell v. Columbian Insurance Company*, 83.
2. In adjusting a loss upon a policy for \$10,000 on a cargo from Alexandria, D. C., to St. Thomas, and two other ports in the West Indies, and back to the United States, the value of the cargo is to be ascertained at the port from which the vessel last sailed before the loss; and if freight has been there earned and not paid, and is not chargeable upon the salvage, it is an addition to the value of the original cargo upon which the loss is to be adjusted. *Catlett v. Columbian Insurance Company*, 192.

BAIL.

1. Bail will not be required in an action upon a bond with a collateral condition *Barbour v. Russell*, 47.

BAIL, (*Continued.*)

2. In ordinary cases of libel, bail is not required without some special reason other than the publication of the libel itself. *Withers v. Thornton*, 116.
3. The Court will not order an execution against bail, to be stayed because a writ of error has been taken out by the principal, which is still pending in the Supreme Court, it not having been taken out in time to be a *supersedeas*; nor will they grant an injunction for the like cause. *Foyles v. Law*, 118.
4. If the bail pay the debt upon execution, and take an assignment of the execution, which is afterwards quashed, he can recover the money from the assignee of the original plaintiff to whom he paid it. *McDaniel v. Riggs*, 167.
5. If the affidavit to hold to bail be, in itself, sufficient the Court will not on a motion to appear without bail, inquire into the merits of the case. *Laverty v. Snelling*, 290.
6. An affidavit that the defendant is justly indebted to the plaintiff in a certain sum for goods sold and delivered to a third person upon a written guaranty of the defendant, is sufficient to hold the defendant to bail. *Ibid.*
7. If the affidavit misname the defendant by mistake of the plaintiff's attorney, the Court will give time to have the mistake corrected. *Tilley v. Tharpe*, 290.
8. Upon a motion to appear without bail, the Court will not examine the merits of the case. *Lee v. Gamble*, 374.
9. If the principal be discharged under a law of one of the States, the bail will be discharged here. *Harrison v. Gales*, 376.
10. If, upon leave to amend, the plaintiff add a count upon a cause of action, which could not be given in evidence upon the original declaration, as sent out with the writ, or which is not contained in the affidavit to hold to bail, the bail must be discharged. *Hyier et al. v. Smith*, 437.

BANK.

1. Money deposited in a bank, in the name of a firm, cannot be drawn out by the individual check of one of the firm, in his own name only; and if the bank pay such a check out of the joint funds, it can only justify itself by showing that the money, thus drawn, was applied to the use of the firm. It is no excuse for the bank, in paying out the joint funds upon the individual check, that the individual partner, who drew the check, told the bank officer that it was drawn on the joint account, and drawn in his individual name by mistake, and directed him to pay it, and any others of the like kind which he might draw, out of the joint funds. *Coote & Jones v. Bank of United States*, 50.
2. The partner thus drawing, and who is one of the plaintiffs, is not a competent witness for the defendants. *Ibid.*
3. An indictment under the sixteenth section of the Act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," must state that the defendant was employed in the bank, or an office of discount and deposit, &c., in some State or territory of the United States. *United States v. Forrest*, 56.
4. The certainty required in an indictment is certainty to a certain intent; certainty to a common intent is not sufficient. Nothing material can be taken by intendment. From the averment that the defendant was a bookkeeper in the office of discount and deposit, the Court, upon demurrer to the indictment, cannot infer that he was a clerk or servant employed in such office. *Ibid.*
5. A count upon the same section, for embezzlement, must aver that the thing embezzled came to his hands, or possession, by virtue of his employment. It is not sufficient to state that it came to his hands "as bookkeeper," or "in virtue of his office as bookkeeper," or "while he acted as bookkeeper." It must appear that he had authority from the bank to have it in his custody, or possession, at the time of the embezzlement.

It is not necessary that the thing embezzled should be the property of the Bank of the United States; nor is it necessary to aver it to be property of any particular person; but it must be averred to have been fraudulently embezzled. "Feloniously" will not supply the place of "fraudulently." The offence must be charged in the words of the act.

A check is not, by name, made the subject of embezzlement; and *quære* whether, if it be a paid or cancelled check, it can be included in the description, "other valuable security or effects."

BANK, (Continued.)

Quere, whether the District of Columbia was a territory within the meaning of the act. *Ibid*.

6. The stockholders of an unincorporated banking company are individually liable, in equity, to the holders of the notes of the company, issued while they were stockholders, notwithstanding an article of their association declares that the joint stock, or property of the company, should alone be responsible, &c.

The date of each note is *prima facie* evidence of the time it was issued.

The holder may have relief in equity, to the full nominal amount of the notes held by him, without showing that he gave any value therefor.

Each stockholder is liable to the full extent of all the notes held by the plaintiff, and issued while he was a stockholder.

It is not necessary that the members of the company, named in the bill but not served with process to appear, should be parties to the suit, although the bill, as to them, should be taken for confessed. *Riggs v. Swann, et al.* 183.

7. The condition of the teller's bond, "faithfully to perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness, or want of care," comprehends damages arising from his want of care, as well as from his unfaithfulness.

The words "six months," in the fourth section of the Act of Congress of the 2d of March, 1821, "to extend the charters of certain banks in the District of Columbia," mean six calendar months.

The teller's bond, executed under the original charter, covered defalcations arising under the extended charter, and after the time when the charter would have expired, but for such extension.

It was not necessary that the teller should be appointed yearly, and from year to year; and an interval of three days, during which the teller continued to act as such, without being reappointed, did not destroy the plaintiff's right of action upon the bond, for damage incurred after such interval by the teller's want of care.

Under this bond, the defendants are bound to save the plaintiffs from all loss arising from any want of care of the teller, if by any degree of care on the part of the teller, it might have been avoided.

The neglect of the cashier to settle the daily accounts of the teller, according to the by-law of the bank, does not discharge the sureties.

The usage of other banks, requiring only reasonable care and diligence, cannot affect the express condition of the bond. *Union Bank of Georgetown v. Forrest*, 218.

8. A check drawn by the defendant, in favor of the plaintiff, or bearer, with the bank's cancelling mark upon it, and produced by the defendant, is not evidence of money paid to the plaintiff. *Lowe v. McCleary*, 254.
9. In June, 1819, the practice of the Bank of Columbia was, not to give out notes for protest until three o'clock P. M., on the third day of grace.

The time for demand, notice, and protest of a promissory note discounted at a bank, depends upon the custom of the bank; and a person who indorses such a note, with knowledge of the custom, is bound thereby. *Bank of Columbia v. McKenny*, 361.

BANK OF COLUMBIA.

1. The issuing of the execution by the Bank of Columbia, under the Maryland Act of 1793, c. 30, is the commencement of the action, in regard to the statute of limitations. *Bank of Columbia v. Moore*, 292.
2. An order for an execution by the President of the Bank of Columbia, under the fourteenth section of its charter, is not a judgment; and a second execution cannot be issued without a new order. The execution is but the commencement of the suit, and, if not prosecuted, it is discontinued. *Bank of Columbia v. Baker*, 432.

BANK OF WASHINGTON.

The bank of Washington has a right, under the eleventh section of its charter, to prevent a transfer, upon its books, of the stock of any debtor of the bank. *Pier-son et al. v. Bank of Washington*, 363.

BANKRUPT.

The assignee under the Bankrupt Law of 1800 cannot deny the authority of the

BANKRUPT, (Continued.)

commissioners under whom he received the property of the bankrupt. *Gulick v. McIver*, 650.

BARON AND FEME.

1. Trover will not lie against husband and wife, for a conversion to her use only. *Hollenback v. Miller*, 176.
2. An action cannot be maintained against the husband for the debt of the wife, after her death, upon an express promise made by the husband in the lifetime of the wife, upon no other consideration than his liability as husband for the debt of the wife, and the property which he acquired in right of the marriage. *Cullan v. Kennedy*, 630.

BASTARDY.

In the county of Alexandria, a justice of the peace has no authority to take the recognizance required by the Virginia Law of December 26, 1792, § 23, unless on application of an overseer of the poor of the county. *Quere*, whether that section is in force in the county of Alexandria? *United States v. Hancock*, 81.

BILLS AND NOTES.

1. If a man write his name, in blank, on the back of a note to which he is not a party, either as payee or indorsee, before the note comes into the hands of the plaintiff, the presumption is, that he did so for the purpose of making himself liable, as the indorser of an ordinary negotiable note, and as if it had been made payable to himself, or order, and not otherwise; and he is entitled to all the rights of an indorser. *McComber v. Clarke*, 6.
2. Notice left at the shop of the indorser's son is not sufficient to charge him, although the shop was in a room of the house in which the indorser resided, the entrance into the shop being separate from that into the dwelling-house; the indorser having no concern in his son's business, and being postmaster, and having a separate office, in which he transacted his public and private business, and the son having a separate dwelling-house. *Bank of United States v. Corcoran*, 46.
3. An agreement by an indorser not to take advantage of the statute of limitations, and to authorize an attorney to agree to docket a suit upon the note, is not evidence from which the jury can infer that the indorser received due notice. *Ibid*.
4. After demand and notice to the indorser, the plaintiff may agree to give time to the maker of the note, without discharging the indorser. *Bank of United States v. Abbott*, 94.
5. The testimony of the notary, that he demanded of the maker payment, on the third day of grace, and gave notice to the indorser of the non-payment, on the third, and also on the fourth day, is competent evidence of demand and notice, although the witness does not recollect the days of the month on which such demand was made and such notice given. *Ibid*.
6. It is not a good ground for a new trial that the bank had in their possession documents of which they did not avail themselves, because they were not known to one of the officers of the bank at the time of trial. *Cooté v. Bank of United States*, 95.
7. *Primâ facie* a bank has no right to charge up to the account of a firm the individual note of one of the partners; and the burden of proof lies on the bank to show the assent of the other partner. *Ibid*.
8. One partner has no right to draw the joint funds in his own name; nor can he lawfully appropriate them to his own use. He has only a right to use the joint name, and to act as and for the firm. *Ibid*.
9. A note payable in twelve months, "with interest," will not support a count upon a note payable in twelve months, without interest. *Blue v. Russell*, 102.
10. The plaintiff was permitted to strike out his own indorsement of the note, after it had been offered in evidence to the jury, and objected to on account of such indorsement. *Ibid*.
11. If the creditor, after judgment against the maker and indorser of a promissory note, give time to the maker, he does not thereby discharge the indorser. *King v. Thompson*, 146.

BILLS AND NOTES, (*Continued.*)

12. In an action against the maker of a promissory note, it is not necessary to show a demand of payment at the bank in which it is made payable. *Bank of the United States v. Bussard*, 173.
13. See BANK, 6. *Riggs v. Swann et al.* 183.
14. If the defendant, indorser of a promissory note, believing that he has a good defence at law, is induced to confess judgment, by the assurance of the plaintiff's attorney at law that if he did so, the plaintiff would immediately proceed to levy, by execution, the amount thereof from the maker, who, he assured the defendant, had sufficient property in the county to satisfy the same; and the plaintiff afterward refuses so to proceed against the maker, although requested so to do, and the maker becomes insolvent, a court of equity will decree a perpetual injunction. *Garey v. Union Bank of Georgetown*, 233.
15. The plaintiff, in October, 1826, sold a horse to the defendant for his bill on the Postmaster-General, payable on the first of January following. The defendant gave the bill, but countermanded it the next day, and acceptance was refused. Held, that the plaintiff had no right of action of *indebitatus assumpsit* for the price of the horse before the first of January. *Magner v. Johnston*, 249.
16. The indorser of a promissory note is discharged from his liability by the holder taking new security, and giving time to the maker without the consent of the indorser. *Bank of United States v. Lee*, 288.
17. The indorsers of accommodation paper are to be considered as joint sureties, and liable to contribution. *McDonald v. Magruder*, 298.
18. If two persons, without any communication or agreement between them, severally indorse a note for the accommodation of the maker, and the first indorser is obliged to take up the note, he may recover one half from his indorsee. *Magruder v. McDonald*, 299.
19. The plaintiff, who is not an indorsee of the note, has no right, at the trial, to strike out the words of a special indorsement written over the name of the indorser, so as to convert it into a blank indorsement; and upon such an indorsement the plaintiff cannot recover, although he afterward obtain the indorsement of the indorsee to himself; because he can only recover, in that action, according to his right of action at the commencement of his suit. *Bank of United States v. Moore*, 330.
20. See BANK, 9. *Bank of Columbia v. McKenny*, 361.
21. The maker and indorser of a promissory note made and indorsed to be discounted for the accommodation of a third person, are not, in the usual course of mercantile transactions, co-sureties; and the indorser is not bound to contribute with the maker in paying the note, unless there was some previous agreement to that effect. *Law v. Stewart*, 411.
22. If Sunday be the last day of grace, the demand, protest, and notice may be on Saturday; and if the protest be after banking hours on Saturday, the suit may be brought the same evening. *Mandeville v. Rumney*, 424.
23. If a bank discount a note for the indorser at six per cent., and give post notes having time to run and not bearing interest, the transaction is usurious, and the bank cannot recover upon the note through such usurious indorsement, although the note itself when given was free from usury. *Farmers and Mechanics Bank of Georgetown v. Gaither*, 440.
24. The plaintiff indorsed a note (as town-indorser,) already indorsed by two others, for the accommodation of the maker, and at maturity was obliged to take it up. Held, that he may recover of the first indorser the whole amount paid to take up the note. *Mason v. Mason*, 648.
25. A promissory note of an emancipated slave given to his master after, and in consideration of, emancipation, is valid. *Negro William Smith v. Parker*, 654.
26. The casual acknowledgment of the debt to a stranger may take the case out of the statute of limitations. *Bank of Columbia v. Moore*, 663.
27. A note made "negotiable" at the Bank of Washington is not a note payable at that bank, and it is not necessary to demand payment there, in order to charge the indorser. *Beeding v. Thornton*, 698.

BOOKS AND PAPERS.

1. If the defendant call for the books of the plaintiff, and, upon their being produced, inspect them, the plaintiff may read them in evidence. *Coote and Jones v. Bank of United States*, 50.

BOOKS AND PAPERS, (*Continued.*)

2. When books have been called for by the opposite party and produced, it is competent for the party producing them to show, by the testimony of a witness, that he has examined the books, and that they do not contain any entries upon or relating to the matters in controversy; the books themselves being in court for the inspection of the opposite party. *Id.* 95.
3. To enable a party to call on the other party to produce papers at the trial, there must be an order of the Court upon the party to produce them; that order must be served a reasonable time before the time for producing them; and there must be reasonable notice also of the motion for the order. *Macomber v. Clarke*, 347.
4. A call for all the letter-books of the bank from its institution to the time when the cause of action arose, was held to be too general. The Court will compel the production of such only as they are satisfied contain evidence pertinent to the issue. The party calling for books has no right to examine them before the trial, to see whether there be not something in them pertinent to the issue. *Triplett and Neale v. Bank of Washington*, 646.

BY-LAW.

1. No penalty was prescribed by the by-law of July 19, 1804, against hawkers and peddlers, for not taking out a license. The by-law is not correctly stated in Burch's Digest, p. 102. *Corporation of Washington v. Townsend*, 653.
2. A justice of the peace in the City of Washington has authority, under the charter of May 4, 1812, and the by-law of December 16, 1812, § 7, to require a common prostitute to give security for her good behavior; and has jurisdiction of a suit upon the bond therefor, the penalty not exceeding twenty dollars. *Dolly Ann Patten v. Corporation of Washington*, 654.
3. A conviction under the by-law of August 16, 1809, is no bar to an indictment for a nuisance by keeping a common gambling-house. *United States v. Holly*, 656.

CALENDAR MONTHS.

See BANK, 7. *Union Bank of Georgetown v. Forrest*, 218.

CHALLENGE.

1. Upon an indictment for unlawfully carrying a challenge to fight a duel, a *scienter* must be proved. *United States v. Shackelford*, 178.
2. It is no legal objection to a juror that he had been one of the jurors in another cause against the same defendant for a different offence; and it seems that the Court has no authority to order talesmen to be sworn until the regular panel has been exhausted; and the names of all the attending jurors will be put into the box, and twelve drawn by lot, by the clerk.

The juror, when called up to be sworn, may be asked whether he has "formed and expressed an opinion upon the guilt or innocence of the defendant upon the indictment in this case;" and before the question is put the indictment may be read by the clerk in the hearing of all the jurors attending the Court. If the question be answered in the negative, the juror may still be challenged for cause; and if challenged for favor, the challenge will be tried by two jurors appointed by the Court, who are to be sworn upon each challenge; and if they cannot agree, the challenge is not supported, and the juror must be sworn.

After a juror is sworn he cannot be challenged; and the Court cannot discharge him without the consent of the parties, although he should state to the Court matters which would be proper evidence upon a challenge for favor.

When a tales is returned, the parties have a right to challenge any of the original panel already sworn in chief; but it must be for a cause arising after the juror was sworn. *United States v. Watkins*, 441.

CHARITABLE USES.

1. A devise in trust to lay out \$200 a year in wood, meal, and clothing, to be distributed among the poor and necessitous widows and orphans within the Corporation of Georgetown, is void for uncertainty. *Barnes v. Barnes*, 269.
2. The statutes of mortmain are in force in Maryland, but the statute of charitable uses is not, and was not when the County of Washington was separated from the State of Maryland. *Ibid.*

CHARITABLE USES, (*Continued.*)

3. If either the object of a legacy, or the person of the legatee, or *cestui que trust*, be so uncertain that no one can show a title to claim the legacy, or to enforce the execution of the trust, the legacy and the trust are void, even in case of an executory devise. If it be an executed, not an executory devise, it is void if there be no person competent to take at the death of the testator. An executory devise is void if it be not necessarily to be executed within a life in being at the death of the testator, or within twenty-one years thereafter. *Ibid.*

CHARTER-PARTY.

1. In an action of covenant, by two survivors, upon a charter-party made with three persons, the declaration should state the death of one, and aver that the defendant had not paid the money to the three, nor to either of them. *Winter et al. v. Simonton*, 62.
2. An agreement to hire a vessel "from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade, for the space of twelve months, at and after the rate of \$425 a month, \$600 to be paid on the arrival of the brig at Havana," the owners covenanting "that the said brig shall be tight, stiff, stanch, and strong, well victualled and manned at their own expense, during that period, the dangers of the sea only excepted," the hirer paying "all port charges and pilotage" at every place to which she may go, is not a contract of freight.

With regard to the destination and loading of the vessel, the hirer is owner *pro hac vice*. The general owner is not bound to see that the master performs the voyages indicated by the hirer; the master and mariners being, in that respect, subject to the order and control of the hirer. *Id.* 104.

3. In an action for the hire of a vessel, according to the terms of a sealed agreement, the defendant, by pleading "that he had paid to the plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect of the said articles of agreement," assumes upon himself the burden of proving that he had paid the hire of the vessel, for the time and at the rate stated in the declaration, and the plaintiffs are not bound to prove any of the facts therein charged. *Ibid.*

CHESAPEAKE AND OHIO CANAL COMPANY.

1. The instalments due by the subscribers to the Chesapeake and Ohio Canal Co. may be recovered on motion, with costs. *Chesapeake and Ohio Canal Co. v. Poor*, 598.
2. To condemn the land of an individual, for the use of the Chesapeake and Ohio Canal Co., is to take private property for public use. *Chesapeake and Ohio Canal Co. v. Key*, 599.
3. The damages assessed by the jury must be considered as the "just compensation" required by the amendment of the Constitution, which forbids the taking of private property for public use, without just compensation. That compensation must be just toward the public, as well as just toward the individual whose property is taken. *Ibid.*
4. The charter granted by Virginia having been ratified and confirmed by Congress, became as much an act of Congress, so far as it is applicable to the District of Columbia, as if it had been reenacted with such modifications as might be necessary to fit it for use in the district. *Ibid.*
5. The power to take private property for public use, upon just compensation, is not a power in derogation of common right. All property is held subject to that power; and the right thus to take private property for public use is as much a common right as is that of the individual.

The canal is a great highway; and all lands are held subject to the right of the public to make a highway through them. *Ibid.*

6. The charter should be so construed as to carry into effect the will of the legislature.

The words "from" and "at" do not always exclude the place to which they refer.

The beginning of the eastern section of the canal is not precisely fixed by the charter, but is left to the discretion of the company, with this limitation only, that it should be in the District of Columbia, and upon tide-water. *Ibid.*

CHESAPEAKE AND OHIO CANAL COMPANY, (*Continued.*)

7. A certain day must be fixed in the warrant, for the meeting of the jury upon the land, and the want thereof is fatal to the inquisition. *Ibid.*

COMMON SCOLD.

1. An indictment, charging the defendant with being a common slanderer, or common brawler, is not sufficient. It should charge the defendant as a common scold, or common barrator, in technical language, these being the only indictable offences of that class. *United States v. Ann Royall*, 618.
2. Upon the trial, on an indictment for being a common scold, particular instances of scolding may be given in evidence.

After conviction, as a common scold, the Court will order the defendant, if in court, to give security for her appearance in court from day to day, to hear the judgment of the Court, and, in the mean time, to be of good behavior.

The law against a common scold, as being a common nuisance, is not obsolete, although the punishment by ducking may be. It is still punishable, as a nuisance at common law, by fine and imprisonment.

Anger is not a necessary ingredient in scolding. *Id.* 620.

CONSIGNEE.

The master of a vessel, who is also consignee of the cargo, has thereby the authority of supercargo during the voyage. *Smedley v. Yeaton*, 181.

CONSTABLE.

1. The sureties in a constable's bond are not liable for money collected by him without legal process. *United States v. Cranston*, 289.
2. In debt upon a constable's bond, for not conveying to the plaintiff property alleged to have been sold to him by the defendant under a *fiery facias*, the breach is defective, in not stating that the execution was levied upon the property, and that the lots were the property of the defendant in the execution; and in not describing the property with sufficient certainty; and is bad in averring an alternative breach. *Hazel v. Waters*, 420.
3. *Quere*, whether a constable, who sells real estate under a *fiery facias*, is bound to give a deed to the purchaser? And whether the return of the officer is traversable in a collateral action? *Ibid.*

CONTEMPT OF COURT.

1. If a juror, after being summoned, voluntarily forms and delivers an opinion, as to the guilt or innocence of the prisoner, with a view to disqualify himself to serve on the jury at the trial, it is a contempt of court, inasmuch as it tends to the obstruction of justice. *United States v. Devaughan*, 84.
2. It is a contempt of court in an acquitted female prisoner to threaten vengeance, in the presence of the Court, against the witnesses; and the Court will fine her, and order her to give security for good behavior. A contempt in the piazza of the court-house, into which the windows of the court-room open, is a contempt in the presence of the Court. *United States v. Louisa Carter*, 423.

CONTINUANCE.

1. In an affidavit for the continuance of a cause, on account of the absence of a witness, it is not necessary to state the particular circumstances of diligence used by the party, to obtain the testimony of such witness. They may be proved *ore tenus*. *Higgs v. Heugh*, 142.
2. When a juror is withdrawn, upon the motion of the plaintiff, and by consent of the defendant, who elects a continuance of the cause, he is not entitled to costs also. *Macomber v. Clarke*, 347.
3. At any time before the fifth term after the appearance term, the plaintiff may obtain a continuance of the cause, upon affidavit that he has recently learned, from his counsel, that the documents upon which he relied are not good evidence for him, and that he wants the testimony of persons beyond sea; although a day, by consent of the parties, had been assigned for the trial. *Fowle v. Bowie*, 362.
4. If a deposition be taken without reasonable notice, the opposite party may obtain a continuance of the cause. *Barrell v. Simonton*, 681.

CONTRACT.

The value of extra work, done upon houses built by contract in writing, cannot be recovered of the owner, unless there was a separate contract between the parties that such extra work should be done by the builder, and paid for by the owner; or unless the owner, while the houses were building, requested the builder to do the extra work, knowing that it was not comprehended in the written contract, and that the cost of the houses would be thereby increased. The mere circumstance that the owner knew that the extra work was doing, and did not object to it, does not raise a contract on his part to pay for it; but is evidence competent to be given to the jury, tending to prove that there was an agreement that the extra work should be paid for by the owner. *Belt v. Cook*, 666.

CORPORATION.

1. See AUCTIONEER, 1. *Fowle v. Corporation of Alexandria*, 70.
2. A corporation aggregate, having, or supposed to have, a corporate fund, is liable, in an action at common law, for negligence of its duty. *Ibid.*
3. The inhabitants of Alexandria, D. C., are no part of the corporation.
A judgment against the corporation cannot be levied on any inhabitant who is not a member of the Common Council. *Ibid.*
4. The "Common Council of Alexandria" is an entirely new corporation, erected by the Act of Congress of 1804, and derives all its powers from that act. By that act, the new corporation is neither authorized to grant licenses to auctioneers, nor to restrain them from exercising that business without license. The old corporation, erected by the Virginia Statute of 1779, by the name of "The Mayor and Commonalty of the Town of Alexandria," was, by its own consent, destroyed, by the repeal of that statute by the Act of Congress of 1804, erecting the new corporation.

The Virginia Act of 1796, "Concerning Corporations," was applicable only to corporations then existing, and created no duty or obligation upon any corporation subsequently erected. *Ibid.*

5. *Quære*, whether the answer of a corporation aggregate, under its seal, not excepted to, and responsive to the allegations of the bill, is such evidence for the defendant that the Court cannot decree against it, unless contradicted by one witness, corroborated by others, or by the circumstances of the case. *Garey v. Union Bank of Georgetown*, 233.

CORPORATION OF WASHINGTON.

1. The Corporation of Washington is not liable to the holder of a sub-ticket, or part of a ticket, for any part of the prize drawn by it. It is only liable to the holder of the whole ticket. *Shankland v. Corporation of Washington*, 328.
2. A *mandamus* will not lie to the Mayor, Board of Aldermen, and Board of Common Council of the city of Washington, to compel them to make such regulations as they may deem proper, prescribing the manner of erecting private wharves within the limits of the city. *Kennedy v. Corporation of Washington*, 595.
3. The managers of "The Lottery for Building Lancastrian School-houses," &c., had no authority to sell quarters of tickets, so as to multiply causes of action against the corporation. *McCue v. Corporation of Washington*, 639.
4. The holder of a prize-ticket cannot, without the consent of the corporation, maintain an action against the managers, upon their bond to the corporation; who may order the suit to be dismissed. *Ibid.*
5. See BY-LAW, 1. *Corporation of Washington v. Townsend*, 653.
6. See BY-LAW, 2. *Dolly Ann Patten v. Corporation of Washington*, 654.
7. See BY-LAW, 3. *United States v. Holly*, 656.

COSTS.

1. If the defendant has obtained a rule on the plaintiff to give security for costs, the Court, at a subsequent term, will presume that the fact of non-residence of the plaintiff was sufficiently proved, or admitted; the burden of proof of residence is then on the plaintiff. *Furlong v. Coleman*, 178.
2. An insolvent debtor who has been discharged under the insolvent act, is not liable for the costs of a suit pending at the time of his discharge. *Law v. Scott*, 295.

COSTS, (*Continued.*)

3. The surety for fees and costs is not liable to attachment for not paying the daily compensation to the plaintiff's witnesses. *Hyer v. Smith*, 376.
4. A notice given at the trial term in Alexandria, that security for costs will be required, is no ground for postponing the trial. *Bennett v. Bennett*, 647.

COVENANT.

1. See CHARTER-PARTY, 1, 2, 3. *Winter et al. v. Simonton*, 62.
2. The assignee of a ground-rent in fee may maintain an action of covenant against the administrator of the original grantee for rent accruing after the death of that grantee, although the land has descended to the heirs, subject to the rent. *Scott v. Lunt*, 285.

DAMAGES.

1. In a contract for the delivery of stone, the following words constitute a penalty, and not liquidated damages, viz. "In witness whereof we bind ourselves to pay, each to the other in case of failure by either of us on this contract, the sum of \$2000 in case the said stone should not be delivered, or, when delivered, paid for as above." *Goldsborough v. Baker*, 48.
2. In an action upon a replevin-bond, the defendant may, in mitigation of damages, give evidence of title in himself. *Smith v. Hazel*, 55.
3. In slander, the plaintiff is not permitted to prove special damage not stated in the declaration, but the plaintiff may recover although he should fail to prove the special damage laid in his declaration. *Kelly v. Huffington*, 81.
4. In an action upon the replevin-bond for not returning the property, the defendant may, in mitigation of damages, show that no rent was in arrear. The value of the goods stated in the replevin bond, is *prima facie* evidence of the plaintiff's damages; and if the defendant should contend for a less amount, the burden of proof is on him to show it. *Wood v. May*, 172.
5. If the jury, in replevin, do not find the value of the goods distrained, their finding of the amount of rent-arrear, is surplusage. *Ibid.*
6. In an action upon a replevin-bond it is competent for the defendant, in mitigation of damages, to show that the title to the property was in the plaintiff in replevin: and the plaintiff in the action upon the bond may rebut such evidence, by showing that the deed, under which the plaintiff in replevin claimed title, was fraudulent and void. *Ringgold v. Bacon*, 257.
7. Upon the dissolution of an injunction to stay proceedings on a judgment of the Circuit Court of the District of Columbia, damages, at the rate of ten per cent. per annum, must be awarded, unless it be a bill to obtain a discovery, or some part of the judgment remain enjoined. *Mason v. Muncaster*, 403.

DEED.

1. Whatever may be the words of grant in a deed, it is the office of the *habendum* to limit and confine them, and to ascertain the commencement and duration of the estate created or conveyed by the deed. *Mitchell v. Wilson*, 242.
2. A deed of bargain and sale was made by J. W. to his brother T. W. "of a negro woman named Bet, and her increase from and after the date hereof," "with this reserve, that they are to remain with my father J. W. who is to hold and have the entire use and benefit of them during his life, and at his decease my said brother Thomas, his heirs, executors, administrators, or assigns, to take, hold, and possess them ever after. To have and to hold the said negro Bet and her increase as aforesaid, (from and after the decease of my father as aforesaid,) unto my said brother Thomas Wilson, his heirs, executors, administrators and assigns, with general warranty from and after the decease of my father as aforesaid." *Held* that neither T. W., nor his father took any thing by the deed. *Ibid.*

DEMURRER.

1. The time of finding the indictment will appear by the caption, when the record is made up, and upon demurrer the judgment must be upon the whole record: and if upon the record it should appear to the Court, that the offence was committed beyond the time limited, judgment must be rendered for the defendant. *United States v. Watkins*, 441.
2. The defendant has a right, upon demurrer, to avail himself of the statute of limitations. *Ibid.*

DEMURRER, (*Continued.*)

3. The limitation of two years in the Act of April 30, 1790, is applicable to common-law offences in the District of Columbia. *Ibid.*
4. The Court may, in a criminal case, suffer the defendant to withdraw his demurrer to the indictment, after argument, and after the Court has intimated an opinion that it ought to be overruled, and before judgment entered upon the demurrer. *Ibid.*
5. Although a judgment against the defendant upon demurrer in a case of misdemeanor, is peremptory, yet it is not so if against the United States, for they may send up new bills of indictment successively, until they have made their case perfect in form. *Ibid.*
6. Upon suffering a defendant to withdraw his demurrer after argument, and after an intimation of the opinion of the Court, they may require him to waive his motion in arrest of judgment for any matter apparent upon the indictment. *Ibid.*
7. Upon a general demurrer the judgment must be against him who commits the first substantial fault in the pleadings. A special demurrer operates as a general demurrer as to all the pleadings of the party demurring.
A rejoinder is bad which avers several distinct answers to the replication, or tenders an issue upon matter of law. *McCue v. Corporation of Washington*, 639.
8. A general demurrer to the declaration must be overruled if it contain one good count, although it contain also three bad counts. *Ibid.*

DEPOSITION.

1. If a *dedimus* issue to take depositions in a cause in which Richard M. Meade is plaintiff, whereas the name of the plaintiff was Richard W. Meade, and the commissioners certify that they took the depositions to be read in a cause in which Richard W. Meade was plaintiff, the depositions are admissible, notwithstanding the clerical error in writing an "M" for a "W," in the commission. In taking a deposition under a commission, it is not necessary that it should be written by the commissioners, or by their clerk, or by the witness. *Meade v. Keane*, 51.
2. A "county commissioner" in the State of Illinois, is not authorized to take depositions under the Judiciary Act of September 24, 1789, § 30, to be used in the courts of the United States. *Garey v. Union Bank of Georgetown*, 91.
3. The certificate of the commissioners, (who have taken a deposition,) that they had taken the oath prescribed in their commission, is sufficient evidence of that fact. They are *quasi* officers of the court, and are to be believed. *Winter et al. v. Simonton*, 104.
4. In a joint action against two, if one only be taken and an *alias capias* be issued against the other from term to term, and if before he be arrested, a deposition be taken on the part of the plaintiff, by consent of the defendant, who was first taken, with an agreement that it should be read at the trial; and if, in the caption of the deposition, one only of the defendants be named, and afterwards the other be taken, the deposition may be read at the trial, against both defendants. *Pannill v. Eliason et al.*, 358.
5. The Orphans' Court is not bound to receive, as evidence, the testimony taken under a commission, not issued by consent of the parties, and not directed to commissioners mutually named by the parties, and not issued in conformity with any established practice, or rule of the Orphans' Court. *Walsh v. Walsh*, 651.
6. The Orphans' Court may adopt the practice of courts of chancery as to the manner of issuing commissions, or it may establish rules of practice for itself in this respect. *Ibid.*
7. Notice at Washington, D. C., to defendant's counsel on Thursday, the 31st of December, that a deposition would be taken in Baltimore on the 2d of January, was not a reasonable notice. *Barrell v. Simonton*, 681.

DESCENTS.

Where proceedings are under the general and ordinary jurisdiction of the Court as a court of law, or a court of equity, many things may be presumed which do not appear upon the record, and evidence will not be permitted to contradict the presumptions arising from the acts of the Court; but if the proceedings be under a special authority delegated to the Court in a particular case, and not under its general jurisdiction as a court of common law, or of equity, nothing

DESCENTS, (*Continued.*)

can be presumed; and the person claiming title under such proceedings, must show them to be regular, and to be in a case in which the Court had jurisdiction; and was authorized to do what it has done.

The proceedings for the partition or sale of the real estate of an intestate, under the Maryland Act of Descents, 1786, ch. 45, § 8, are under a special jurisdiction given to a county court in a particular case, and every thing necessary to their validity must be proved.

A sale under that statute is the act of the commissioners, not of the Court, and to be valid must be ratified by the Court; and such ratification must be absolute, not dependent upon an act to be done *in pais*; and if all the heirs are minors at the time of sale, it is void. *Tolmie v. Thompson*, 123.

DETINUE.

Detinue will lie for a slave, although the defendant obtained the possession tortiously. *Bernard v. Herbert*, 346.

DEVISE.

1. A devise to Z. K. or his heirs, is a devise to him and his heirs, and a proviso that one of the devisees' sons should have a double portion more than his other children, takes effect only in case of the death of the devisee in the lifetime of the testator. *Kinsey v. Kinsey*, 85.
2. A devise to the executor in trust to apply the rents and income to the support of the widow, with power to sell the estate if the income should not be sufficient, is a devise in fee to the executor; and he is entitled to receive the rents accruing after the death of the wife. *Hardy v. Redman*, 635.

DISCONTINUANCE.

1. If the defendant in replevin does not appear at the return term of the writ, the action is discontinued; and the Court will not, at a subsequent term, reinstate it upon affidavit that the defendant requested an attorney to enter an appearance for him, and supposed it had been done. *Thompson v. Wells*, 5.
2. After the discontinuance of a replevin the goods are no longer in the custody of the law, and the defendant is not guilty of a contempt, in taking possession of them. *Mitchell v. Wilson*, 92.

DISTRESS.

1. Goods fraudulently removed by the tenant, although not secretly nor clandestinely, may be followed and distrained by the landlord. *Jenkins v. Calvert*, 216.
2. The tenant's removal of his goods before the expiration of the term, without the knowledge of the landlord, and without paying the rent, is a fact from which the jury may infer that the removal was fraudulent as to the landlord. *Ibid.*
3. Trover against the owner will not lie by a bailiff who distrains goods for rent, and leaves them on the premises of the owner who takes them away. *King v. Fearson*, 255.
4. The personal estate of the testator is not liable for taxes accruing upon his real estate in Georgetown, D. C., after his death; but is liable for the taxes upon his personal estate. *Ross v. Holtzman*, 391.
5. A distress is not a judicial process. One distress may be made for taxes due to the corporation, and to the county if made by the same collector. *Ibid.*
6. A distress is the private remedy of the party entitled to the rent, toll, service, tax, or other duty for which the tenant, or debtor, is liable. When the party who has made the distress, comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the Court. *Ibid.*
7. Goods conveyed in trust to indemnify the landlord and his indorser against their responsibility upon a note, made by the landlord, and indorsed by a third person, for the accommodation of the tenant, and left upon the premises by the consent of the landlord, are not liable to distress for rent accruing after the deed of trust, while the third person remains liable as indorser of the note. *Law v. Stewart*, 411.
8. The slave of a stranger, hired to, and in the service and employment of a lodger, in a boarding-house with the consent of his owner, and found upon the premises, is not liable to be distrained for rent due by the boarding-house keeper; being exempted by the broad principle of public convenience; and not on the ground

DISTRESS, (Continued.)

of his being in the actual use and personal service of his master, unless he is so at the time of the seizing of him by way of distress, and unless the taking of him would be, or tend directly to a breach of the peace. *Beall v. Beck*, 666.

DOWER.

1. Upon a writ of dower, the marriage may be proved by parol evidence of cohabitation as man and wife. *Blodget v. Thornton*, 176.
2. A widow cannot be barred of her dower by a tax-sale, either under the Act of Congress laying a direct tax, or for the county taxes; nor by a sale under a decree in the life-time of the husband. *Blodget v. Brent*, 394.
3. A widow, before actual assignment of her dower, has no estate in the land. It is an incumbrance upon the land into whose hands soever it may pass; but she is not seized, and has no right to enter, or to pay the taxes, or to redeem the land when sold for taxes. The tenant, until assignment of dower is bound to pay the taxes. A purchaser at a sale for taxes acquires only the right of the person in whose name the property was assessed. *Ibid.*

DUEL.

See **CHALLENGE**, 1. *United States v. Shackelford*, 178.

ELECTION.

1. Upon a motion to discharge a defendant arrested upon a *capias ad respondendum*, by a marshal appointed by the President *de facto* of the United States, the Court will not decide the question whether he was duly elected to that office. *Peyton v. Brent*, 424.
2. The mortgagor of stock in the Marine Insurance Company, until foreclosure or sale under the mortgage, is entitled to vote upon the stock at the election of directors, and the Court will compel the mortgagee, or his trustee, to give a power of attorney to the mortgagor to vote at such election. *Vowell v. Thompson*, 428.

EMBEZZLEMENT.

See **BANK**, 5. *United States v. Forrest*, 56.

EQUITY.

1. A court of equity will at any time, upon motion and notice, dissolve an injunction, for want of equity in the bill. *Kidwell v. Masterson*, 52.
2. A court of equity will not grant relief upon grounds of which the complainant might have availed himself at law. *Ibid.*
3. Before a court of equity will stay a judgment at law, it must see clearly that the complainant has equity on his side. *Ibid.*
4. If a complainant in equity has lost his legal lien and priority, a court of equity will not set it up against other creditors equally meritorious. *Kurtz v. Hollingshead*, 68.
5. See **BANK**, 6. *Riggs v. Swann et al.* 183.
6. The complainant may file exceptions to the defendant's answer, although two months have expired after the answer was put in, if the defendant has not left a rule to reply. *Brent v. Venable*, 227.
7. See **BILLS AND NOTES**, 14. *Garey v. Union Bank of Georgetown*, 233.
8. A purchaser under a decree for the sale of real estate, for deficiency of personal estate, will be authorized by the Court to redeem the property from a tax-sale, and will be allowed to deduct from the purchase-money the amount paid for such redemption. *Oneale v. Caldwell et al.* 312.
9. The purchaser under the decree of the Court is the "legal representative" of the proprietor who was chargeable with the tax, and is entitled within two years after the tax-sale to redeem the property, under the first provision of the tenth section of the city charter of 1820, upon payment of the taxes and expenses of sale paid by the purchaser, with ten per cent. per annum as interest thereon; and is not bound to pay for any improvements, nor for interest on taxes paid after the tax-sale. The word "reinstate" must be construed to apply as well to the "legal representative" of the proprietor charged with the tax, as to the proprietor himself. *Ibid.*
10. The court of equity which decrees a sale of real estate has authority in Washington county, D. C., to cause the purchaser under its decree to be put in posses-

EQUITY, (*Continued.*)

- sion by a writ of injunction; and, if that be disobeyed, by a writ of *habere facias possessionem*. *Ibid.*
11. This Court, at Washington, cannot decree the sale of the lands of an intestate, if any of the heirs are non-resident infants. *Hastings v. Granberry*, 319.
 12. *Quære*, whether this Court, as a court of chancery, can decree partition or sale of the real estate of an intestate, under the Maryland Act of Descents of 1786, c. 45, § 8? *Ibid.*
 13. A decree must be according to the *allegata* as well as *probata*. *Ibid.*
 14. The proceeds of sale of an equitable title to land are equitable, not legal assets. *Law v. Law*, 324.
 15. In a suit upon a creditor's bill charging the real estate of the intestate for deficiency of the personal assets, the answers of the administrator and his account settled with the Orphans' Court are *prima facie* evidence of the insufficiency of the personal estate, against the answers of the infant defendants, who do not pretend to have any personal knowledge upon the subject. *Hayman v. Keally et al.* 325.
 16. An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed. *Ibid.*
 17. It is no bar, in equity, to the statute of limitations, that the plaintiff could not proceed against the real estate until the personal was exhausted, or the deficiency of personal assets ascertained.
If the plaintiff's right of action is barred at law by the statute of limitations, it is barred in equity. *Ibid.*
 18. The principle that the statute of limitations will not protect trustees applies only to express, not constructive trusts. *Ibid.*
 19. If the statute of limitations begins to run in the lifetime of the intestate, it is not interrupted by his death, and the want of administration. *Ibid.*
 20. A mere equitable interest in lands is not liable to attachment and condemnation by way of execution, under the Maryland law of 1715, c. 40. *Sawyer v. Mortè*, 331.
 21. Under the English statute of Geo. 2, respecting lands in the plantations, the legal estate only was liable to execution at law. The cases of *Campbell v. Morris*, *Pratt v. Law and Campbell*, and *Ford v. Philpot*, considered. *Ibid.*
 22. The answer of a defendant in chancery is not evidence of new matter set up by way of defence, and not responsive to any allegation in the bill. *Robinson v. Cathcart*, 377.
 23. The representation, by the plaintiff, of his opinion upon a subject respecting which the defendant is as competent to judge as the plaintiff, if honestly made, although incorrect, cannot be considered as such a misrepresentation of a material fact as should prevent a decree for the specific execution of a contract. *Ibid.*
 24. A voluntary settlement, however free from actual fraud, is, by the operation of the statute of 27 Eliz. c. 4, deemed fraudulent and void against a subsequent purchaser for valuable consideration, even where the purchase has been made with notice of the prior voluntary settlement. *Ibid.*
 25. In the following words, in a written contract, namely, "In further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of 1000 dollars," the sum of 1000 dollars is a penalty, and not liquidated damages. *Ibid.*
 26. The parol evidence which is to control the plain legal import and construction of a written instrument, if admissible at all, (which perhaps it may be in showing cause against a decree for specific performance,) should be very clear, strong, and explicit; and not dependent on mere inferences drawn from equivocal expressions recollected some years after the transactions. *Ibid.*
 27. The decree must be according to the *allegata* as well as *probata*. *Ibid.*
 28. A mistake of the law is not a ground of relief in equity, where no fraud is charged. *Ibid.*
 29. A vendee coming into equity to obtain the legal title of a lot upon which the purchase-money has been fully paid, must pay the balance due to the vendor upon other lots. *Bank of Columbia v. Dunlop*, 414.
 30. A legal term for years does not merge in an equitable title to the reversion. *Little v. Ott et al.* 416.

EQUITY, (*Continued.*)

31. It is no equitable ground for enjoining a judgment at law, that the complainants have commenced a suit at law against the plaintiffs at law, to recover unliquidated damages upon a contract, unless the plaintiffs are insolvent, or some good ground exists to believe that the complainants would not be able to obtain payment of the damages which they might recover. *Boone v. Small*, 628.
32. The Court will decree a specific execution of an agreement to convey real estate, although the evidence of the conclusion of the agreement be not very clear, if the party in expectation of such agreement has been put into possession, and has made valuable and expensive improvements upon the property. *Thompson v. King*, 662.
33. A court of equity will not sustain a suit to compel the settlement of the concerns of partners in a government contract, in the profits of which the agent of the government, who made the contract, was to participate. *Bartle v. Coleman*, 283.

ESTOPPEL.

1. In an action upon a prison-bonds bond, the defendant is estopped to deny that there was such a judgment as that recited in the bond; and the plaintiff is not bound to produce the record of the judgment. *Allen v. Magruder*, 6.
2. If the vendor in a deed of land, has no title at the date of the deed, but acquires a good title afterward, the title thus acquired enures to the benefit of the first vendee against a subsequent vendee who claims by a deed made after the title accrued to the vendor; and the vendor, and all who claim under him, are estopped, by his first deed, to deny that the vendor had title at the date of that deed. *Corcoran v. Brown et al.* 143.

EVICTION.

In an action for mere use and occupation, not founded on an express contract for an entire rent, eviction of part is not a bar to the whole action. *McGunnigle v. Blake*, 64.

EVIDENCE.

1. By pleading the general issue, the defendant admits the right of the plaintiffs to sue by the name of Charles Maret & Son, without naming the son; and a note indorsed to the plaintiffs by that name, and produced by them on the trial, is *primâ facie* evidence of the existence of such a firm. *Charles Maret & Son v. W. Wood*, 2.
2. An action on the case will lie for the seduction of the plaintiff's daughter, whereby he lost her service. *Mudd v. Clements*, 3.
3. In an action on the case for seduction of the plaintiff's daughter, *per quod servitium amisit*, the plaintiff may give evidence that the defendant promised to marry the daughter, as a means of the seduction. *Ibid.*
4. See **BILLS AND NOTES**, 2, 3. *Bank of United States v. Corcoran*, 46.
5. Declarations of the plaintiff, after the date of the contract, may be given in evidence by the defendant, to mitigate the damages, as well as to contradict the plaintiff's evidence. *Goldsborough v. Baker*, 48.
6. If a witness for the plaintiff testifies that on a certain day he paid to the defendant a certain sum of money and took his receipt, the plaintiff is not bound to produce the receipt on the trial. *Meade v. Keane*, 51.
7. See **DEPOSITION**, 1. *Ibid.*
8. In an action upon a replevin-bond, the defendant may, in mitigation of damages, give evidence of title, in himself, of the property replevied. *Quære. Smith v. Hazel*, 55.
9. In a suit for freedom, a judgment against the defendant, upon his disclaimer and default in not rejoining, is not *primâ facie* evidence of the freedom of the petitioner, in a subsequent suit by him against another defendant, although this other defendant should, after such judgment, have filed a paper in that suit, claiming the petitioner as his slave. *Negro William v. Vanzandt*, 55.
10. Possession of, and acts of ownership over, a colored person, are *primâ facie* evidence of slavery and ownership, and a sale of a slave by an importer, within three years after importation, gives the slave his freedom, if such importer be the sole owner; but if the importer has only a distributive interest, with others, in the slave, such sale does not give freedom. *Ibid.*
11. See **DAMAGES**, 3. *Kelly v. Huffington*, 81.

EVIDENCE, (*Continued.*)

12. The testimony of the notary that he demanded of the maker payment of the note on the third day of grace, and gave notice to the indorser of the non-payment on the third, and also on the fourth day, is competent evidence of demand and notice, although the witness did not recollect the day of the month on which the demand was made and the notice given. *Bank of United States v. Abbott*, 94.
13. See **BILLS AND NOTES**, 7. *Coote v. Bank of United States*, 95.
14. See **BILLS AND NOTES**, 9. *Blue v. Russell*, 102.
15. See **ACCOUNT**, 1, 2, 3, 4, 5. *Barry v. Barry*, 120.
16. One of the defendants, if released by the plaintiff, may, if willing, be sworn and examined as a witness for the plaintiff. *Patriotic Bank v. Coote*, 169.
17. The defendants were not permitted to give secondary evidence of the contents of a check, without first showing that the original check was not in their power. *Ibid.*
18. When a witness is produced to testify as to the credibility of another witness, the proper questions to be put to the witness are, "Do you know the common reputation of the witness for veracity among the generality of his acquaintance?" "From your knowledge of his general reputation for veracity, would you believe him upon his oath?" The witness is not to be asked who were the persons he had heard say that the general reputation of the witness for veracity was not good. The fact to be ascertained is the common repute as to truth. *Ibid.*
19. If one member of a firm draw out the joint funds by a check in his own name only, the burden of proof of his authority to do so is on the creditor. *Ibid.*
20. See **DOWER**, 1. *Blodget v. Thornton*, 176.
21. The defendant had settled his accounts with the plaintiffs, and paid the balance then claimed. The plaintiffs afterwards changed the entries in their books, so as to show a balance still due to the plaintiffs, and presented him an account thus stated, which the defendant refused to admit or receive as a true statement of his account, but received it only as containing the then aspect of the plaintiff's books. The Court refused to compel the defendant to produce that account at the trial, unless accompanied by the defendant's affidavit of those facts. *Bank of United States v. Wilson*, 213.
22. Payment of a check by the bank on which it was drawn is *prima facie* evidence of funds, especially when the checks have been surrendered to the drawer. *Ibid.*
23. See **AUDITOR**, 2. *Bank of United States v. Johnson*, 228.
24. If evidence be given to the jury, without objection, which the Court afterward decides to be inadmissible, the Court will instruct the jury that it is not evidence properly before them. *Ibid.*
25. See **CORPORATION**, 5. *Bank of United States v. Williams*, 240.
26. See **ACCOUNT**, 6. *White v. Macon*, 250.
27. See **BANK**, 8. *Lowe v. McClery*, 254.
28. Every negro is *prima facie* to be considered as a slave, and the property of somebody; and he who acts in respect to him as if he were a free man acts at his peril, and the burden of proof is on him to show that the negro is not a slave, or at least to show such circumstances as will rebut the presumption arising from color. *Mandeville et al. v. Cookenderfer*, 257.
29. If the keeper of a public stage-coach office send a negro away in the coach, it is *prima facie* evidence of carelessness. *Ibid.*
30. Payment of a check, by a bank, is *prima facie* evidence of funds, and that the apparent state of the funds upon the books of the bank justified the payment; and it is incumbent upon the bank to prove the error, if there was any. *Bank of United States v. Washington*, 295.
31. A bookkeeper of a bank is not obliged to answer a question, the answer to which might charge him with the loss. *Ibid.*
32. See **EQUITY**, 15, 16, 17, 18, 19. *Hayman v. Keally et al.* 325.
33. In assault and battery, the plaintiff, being a mulatto, cannot, at the trial upon the general issue, be compelled to prove his freedom. *Murray v. Dulany*, 343.
34. Upon the plea of the statute of limitations, the plaintiff cannot avail himself of the exception in favor of merchants' accounts without stating it in his replication; it is not admissible in evidence upon the general replication to the plea. *Clarke v. Mayfield*, 353.
35. See **DEPOSITION**, 4. *Pannill v. Eliason*, 358.

EVIDENCE, (*Continued.*)

36. In a suit by negroes for their freedom, the proceedings in a suit for alimony, between the master and his wife, are competent evidence for the defendant, the wife, after the death of the husband. *Negro Phillis et al. v. Gibson*, 359.
37. The belief of a witness, together with the facts upon which that belief is founded, is admissible evidence to the jury. *Bank of Columbia v. McKenny*, 361.
38. An acknowledgment to the plaintiffs' counsel, by the indorser, that he indorsed a draft drawn by the defendant, which was not then shown to him, is *primâ facie* evidence of his indorsement in a suit against the drawer, and throws the burden of proof upon the defendant, to show that there were other drafts drawn by the defendant, and indorsed by the same indorser. *Hyer et al. v. Smith*, 437.
39. An indorsement "to the order of Messrs. Hyers, Bremner, & Burdett," is not evidence of an indorsement to Hyer and Burdett, "survivors of Bremner." *Ibid.*
40. Upon the plea of *nul tiel record*, a transcript of the record of a justice of the peace in Pennsylvania, certified by him to the county court, and certified by the prothonotary and the presiding judge of that court, according to the Act of Congress, is evidence of the judgment, although that transcript consists of short docket-entries. *Hade v. Brotherton*, 594.
41. See BOOKS AND PAPERS, 4. *Triplett and Neale v. Bank of Washington*, 646.
42. The cashier of a bank is a competent witness to prove that the defendant has overdrawn his account.
Payment of a check is *primâ facie* evidence of funds. *Bank of Alexandria v. McCrea*, 649.
43. A receipt for the last year's rent is evidence that the rent for the preceding years had been paid. *Jenkins v. Calvert*, 216.
44. See AMENDMENT, 2. *Bell v. Davis*, 4.

EXECUTION.

1. A decree in a chancery attachment, after the expiration of the year and day, must be revived by *scire facias* before execution can be had. *Veitch et al. v. Farmers Bank*, 81.
2. See BAIL, 3. *Foyles v. Law*, 118.
3. See BAIL, 4. *McDaniel v. Riggs*, 167.
4. See BANK OF COLUMBIA, 1. *Bank of Columbia v. Moore*, 292.
5. A judgment may be kept alive, by taking out a *fieri facias* within the year and day, to lie in the office, and so from year to year; and a *fieri facias* taken out within the last year and day, and put into the marshal's hands, may be executed; and, if returned *nulla bona*, a new execution may, at any time thereafter, be taken out without *scire facias*. *Ott v. Murray*, 323.
6. See ATTACHMENT, 6. *Sawyer v. Mortè*, 331.
7. See BANK OF COLUMBIA, 2. *Bank of Columbia v. Baker*, 432.

EXECUTORY DEVISE.

See CHARITABLE USES, 3. *Barnes v. Barnes*, 269.

FALSE PRETENCES.

1. The Circuit Court of the District of Columbia, for the county of Washington, has jurisdiction of an offence committed in that county against the common law of Maryland, adopted as the law of the United States for that county, by the Act of Congress of the 27th of February, 1801, although that offence may consist in the fraudulently obtaining of the money of the United States, by an officer of the United States, by means of false pretences. *United States v. Watkins*, 441.
2. By the cession of this part of the district to the United States by Maryland, all the State prerogative which Maryland enjoyed under the common law, which she had adopted, so far as concerned the ceded territory, passed to the United States.

All the power which Maryland had, by virtue of that common-law prerogative, to punish by indictment, offenders against her sovereignty, and to protect that sovereignty, as to this district, became vested in the United States. The United States, therefore, have a criminal common-law jurisdiction in this part of the district, and this Court has a criminal common-law jurisdiction. *Ibid.*

FALSE PRETENCES, (*Continued.*)

3. Frauds affecting the public at large, or the public revenue, constitute a distinct class of cases punishable by indictment, although the fraud be not effected by means of false public tokens, or by forgery, or conspiracy, or by any particular sort of means. The principle which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by tokens, or false pretences, or forgery, or conspiracy, does not apply to direct frauds upon the public. All frauds affecting the public at large, or an indefinite number of persons, who have suffered a common or joint damage, by reason of the fraud, are indictable offences at common law. *Ibid.*
4. In an indictment for obtaining money by false pretences, the averment must state what was pretended, and that what was pretended was false, and wherein, and in what particular, it was false. *Ibid.*
5. An indictment averring that the defendant, "ostensibly for the public service, but falsely, and without authority, caused and procured to be issued, from the Navy Department of the United States," a certain requisition set forth in the indictment, cannot be supported as an indictment for forgery. *Ibid.*
6. An indictment for obtaining money by false pretences, one of which is stated to be an erasure in an account rendered to the defendant, cannot be maintained as an indictment for forgery. *Ibid.*
7. Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constitute the fraud.
Whether an act be done fraudulently, or not, is a question of law, so far as the moral character of the act is involved. To aver that an act was fraudulently done, is, therefore, so far as the moral character of the act is involved, to aver a matter of law, and not a matter of fact.
No epithet, or averment of a fraudulent intent, can supply the place of an averment of the fact, or facts, from which the legal inference of fraud is to be drawn.
Deceit is an essential ingredient in fraud. No fraud can be committed but by deceitful practices; and the particular deceitful practices, by which the fraud is alleged to have been committed, must be specially set forth, so that the deceit may appear upon the face of the indictment, that the Court may judge whether the fraud, which constitutes the crime, can be inferred from the facts stated in the indictment. *Ibid.*
8. An indictment is not a good indictment at common law, for forgery by erasure, unless it use the technical term "forge, or counterfeit." *Ibid.*
9. The Court may, in its discretion, give an additional charge to the grand jury, although they should not ask it; and, when they do ask it, the Court may, perhaps, be bound to give it, if it be such an instruction as can be given without committing the Court upon points which might come before them, to be decided on the trial in chief.
When an instruction to the grand jury is asked, either by the accused or the prosecutor, it is a matter of discretion with the Court to give the instruction or not, considering the extent of the prayer, and all the circumstances under which it is asked. *Ibid.*
10. If an officer of the government of the United States, not intrusted with public money, get it into his hands by fraud, and appropriate it to his own use, the offence is not an official misdemeanor, but is an offence at common law. *Ibid.*
11. A count, describing the deceptive means by which the defendant procured the placing of public money in the hands of a navy agent, and also the means by which the defendant got the money into his own hands, for his own use, from that agent, does not charge two separate offences. *Ibid.*
12. If one necessary link, in the chain of means to accomplish the fraud, was obtained by deceptive practices, those deceptive practices are as effectual in constituting the offence, as if every other link in the chain had been forged by the like deception. The deceitful practices used, in obtaining one of the means of effecting the fraud, infect the whole transaction. *Ibid.*
13. If a person in Washington, D. C., by deceitful practices, causes money of the United States to be placed to his credit in New York, and subject to his draft, and he draws, accordingly, in Washington, and there gets the draft discounted

FALSE PRETENCES, (*Continued*)

by a broker, and there receives the proceeds of the draft, the fraud is consummated in Washington if the drawee honors and pays the draft, and thereby ratifies the act of the broker in advancing the money; but, until the draft is paid, the offence is not complete. *Ibid.*

14. If, upon the whole record, it should appear to the Court that the offence was committed beyond the time limited by the statute, the judgment must be for the defendant.

The defendant has a right to avail himself of the statute of limitations, upon demurrer.

The limitation of two years, in the Act of Congress of the 30th of April, 1790, is applicable to common-law offences in the District of Columbia. *Ibid.*

15. The Court may, in a criminal case, suffer the defendant to withdraw his demurrer to the indictment, after argument, and after the Court has intimated an opinion that it ought to be overruled, and before judgment entered upon the demurrer. Although a judgment against the defendant upon demurrer is peremptory, yet it is not so if against the United States; for they may send up new bills of indictment, successively, until they have made their case perfect in form.

Upon suffering a defendant to withdraw his demurrer after argument, and after an intimation of the opinion of the Court, they may require him to waive his right to move in arrest of judgment, for any matter apparent upon the indictment. *Ibid.*

16. A party cannot discredit his own witness, by testimony as to his general character, but may give evidence to contradict any important fact to which the witness has testified.

A fact is not immaterial, if it shows that the party prevaricated in relation to a fact in issue. *Ibid.*

17. If the jury bring in a verdict not answering to the whole matter in issue, the Court, without recording the verdict, will inform the jury that they may retire again, and reconsider their verdict. If they then return a verdict to which neither party objects, it will be recorded. *Ibid.*

18. See CHALLENGE, 2. *Ibid.*

19. The Circuit Court of the District of Columbia has jurisdiction of any common-law offence committed in the county of Washington, by an officer of the government of the United States, of which it would have jurisdiction if committed by a person not an officer of the United States, although such offence should have been committed by means consisting, in part, of acts done by virtue, or by color, of his office. *Ibid.*

20. If the jury has been out a long time, without any probability of agreeing, the Court may, in a case of misdemeanor, discharge them without the consent of the defendant. *Ibid.*

21. If a verdict is so imperfect that no judgment can be rendered upon it, it must be considered as no verdict; a *venire de novo* must be awarded; the defendant has never been in jeopardy.

The recording of a verdict does not prevent the Court from deciding that it is so imperfect as not to justify a judgment.

A verdict which finds only one or two out of many facts necessary to constitute the offence, and saying nothing of the residue, is not a partial verdict in the technical sense of those words.

If the jury do not find a general verdict, nor a partial verdict, nor a special verdict, they find no verdict.

A verdict in a criminal case, finding a fact which, if specially pleaded, would be a good defence, is to be considered and entered as a general verdict; so also if it find a fact inconsistent with the guilt of the defendant; but it is otherwise, when the facts found neither establish, nor are inconsistent with, the guilt or the innocence of the defendant. *Ibid.*

22. Upon the trial of an indictment for a fraud at common law, upon the United States, by an officer of the United States, in getting into his own hands, and appropriating to his own use, money of the United States, which he had no right or authority to receive, the fact that he obtained the money in his official capacity is immaterial. *Ibid.*

23. The Court refused to instruct the grand jury, that a certain paper intended to be offered in evidence to them, by the Attorney for the United States, was such a

FALSE PRETENCES, (*Continued.*)

paper as could be the subject of forgery at common law, and that certain specified facts and intents amounted to forgery at common law; and that if they found those facts and intents they ought to find the bill, although it contained the word "forged." *Ibid.*

24. Counsel are not permitted to argue to the jury the question of law which has been, by both parties, submitted to the Court, and by them decided, and the jury instructed thereupon. The only way in which the jury can decide the law of the case is, by finding a general verdict.

If the instruction given exceed the matter submitted to the Court, and involve questions of law not involved in the instruction prayed, the counsel will be permitted to argue before the jury the questions of law not involved in the instruction asked and submitted to the Court; and if the opposite counsel withdraw their prayer, the Court will withdraw its instruction, and leave the question of law to be argued before the jury, reserving the right of the Court to instruct the jury on the questions of law, after the close of the argument to the jury. *Ibid.*

25. Although the Fourth Auditor had no authority, by law, to direct the disposition of the money of the United States, in the hands of a Navy Agent, the payments, by the latter, of the drafts of the former, were not, necessarily, payments in his own wrong.

If the Fourth Auditor had such authority, the Navy Agent might, under possible circumstances, be excused for paying his drafts not officially drawn, and such drafts and payments might be a fraud on the United States. The fact that the government has credited the Navy Agent for such payments, and charged the same to the drawer, does not exculpate him. The fact that the money drawn for was ultimately paid by the Navy Agent in New York, does not prevent the Circuit Court of the District of Columbia from having jurisdiction of the cause, if the defendant received the money in Washington by a discount of the draft. *Ibid.*

26. If the official character of an officer of the United States be not a necessary ingredient of the offence charged in the indictment, the naming of him as such, and the averment that he was such an officer, will not prevent a court of law from taking cognizance of the offence. *Ibid.*

FAUQUIER AND ALEXANDRIA TURNPIKE COMPANY.

The President of the Fauquier and Alexandria Turnpike Company, without the Directors, had no power to issue certificates of stock. No certificate could be lawfully issued to a new subscriber. The company is not bound by the acts of its agents, unless acting within the scope of their authority; and a special agency must be strictly pursued.

The president had only a special authority, and having exceeded it, by issuing certificates of stock without the authority of the directors, and without consideration, his acts did not bind the company. *Holbrook v. Fauquier and Alexandria Turnpike Co.* 425.

FLOUR INSPECTION.

1. In an action for a penalty, under the Virginia Act of December 21, 1792, "regulating the inspection of flour and bread," it is not necessary that the United States should be nominally a plaintiff, but it may be recovered in an action *qui tam*. *Cloud qui tam v. Hewitt*, 199.
2. In an action for a penalty, for altering the inspector's marks on barrels of flour, it is necessary to set out the marks, and how altered. *Ibid.*
3. The word "condemned" must be branded on the cask, or it is not within the fifteenth nor tenth section of the act. *Ibid.*

FORGERY.

1. The person whose paper is forged is a good witness for the prosecution. *United States v. Brown*, 268.
2. The following is "an order for the payment of money, or delivery of goods," within the second section of the Maryland Act of 1799, c. 75, namely — "Mr. E. M. Linthicum will please to let the bearer, John Brown, have such articles as he may choose, on my account, to the value of thirty dollars; also twenty dol-

FORGERY, (*Continued.*)

lars in cash, and oblige his friend, Henry Tayloe, for Colonel John Tayloe. Washington City, 24th December, 1827." *Ibid.*

3. See FALSE PRETENCES, 5, 6, 8, 23. *United States v. Watkins*, 441.

FRAUD.

1. An absolute deed of all the household furniture, and all the stock in the shoe business, is fraudulent and void, as to creditors, unless possession, *bonâ fide*, accompany and follow the deed; but if the goods, at the date of the deed, were actually delivered to the grantees for a valuable consideration, and then taken into the possession of one of the grantors, who was *bonâ fide* the known agent of the grantees, and who, as such, received and exercised exclusive possession *bonâ fide* publicly and notoriously, for the sole use and benefit of the grantees, so that the change of possession was notorious and unequivocal, such possession was not inconsistent with the deed, and did not make it fraudulent and void, as to the creditors of the grantors; but if the possession remained with the grantors jointly, although the said agent was one of them, such possession was inconsistent with the exclusive possession of such agent, and was not such a possession as gave effect to the deed, as a valid deed against the creditors of the grantors. *Reed v. Minor*, 82.
2. See ASSETS, 1. *Lynn v. Yeaton*, 182.
3. See DISTRESS, 1, 2. *Jenkins v. Culvert*, 216.
4. See DAMAGES, 6. *Ringgold v. Bacon*, 257.
5. See EQUITY, 33. *Bartle v. Coleman*, 283.
6. The statute of frauds, which requires that a declaration of trust of lands should be in writing, can be pleaded only by him who has the legal estate, and is sought to be charged with the trust. *Oneale v. Caldwell*, 312.
7. An absolute bill of sale of chattels is void as to creditors, if the possession does not accompany and follow the deed. *Travers v. Ramsay*, 354; *Moore v. Ringgold*, 434.
8. If the vendor and vendee of chattels live together in the same house, the possession will be presumed to be and remain in the vendor, until the contrary is shown. *Ibid.*
9. See FREEDOM, 7, 8. *Negro Phillis v. Gibson*, 359.
10. See FALSE PRETENCES, 1, 3, 7, 10, 12, 13, 14, 22, 25, 26. *United States v. Watkins*, 441.

FREEDOM.

1. See EVIDENCE, 9, 10. *Negro William v. Van Zandt*, 55.
2. Upon a petition for freedom by slaves, entitled to emancipation at a future day the Court refused to instruct the jury that they might find their verdict for the petitioners, although that day had not yet arrived; and upon a special verdict, showing their right to emancipation at a future day, not yet come, the Court rendered judgment for the defendant, and refused, as a court of equity, to continue an injunction which had been served upon the marshal, to prevent him from delivering the petitioners to the defendant at law, during the pendency of their suit for freedom; being of opinion that the only ground of the right of the Court to interfere was the petitioner's claim to immediate freedom, and the pendency of their suit at law. That the fears alone of the petitioners, that the defendant, who was a citizen of Maryland, would violate the laws of that State, were not a sufficient ground of jurisdiction, to require of him security that he would not do so. *Negro Lizette Lee v. Preuss*, 112.
3. See ATTACHMENT, 4. *Negro Richard v. Van Meter*, 214.
4. If a slave be not brought into the county of Washington for sale, nor to reside permanently, he is not entitled to freedom under the Maryland Act of 1796, c. 67. *Negro Louisa v. Mason*, 294.
5. If a citizen of Virginia, the owner of a slave there, who had resided there three whole years, remove into the county of Washington, with a *bonâ fide* intention to settle therein, and bring the slave with him at the time of his removal, or within one year thereafter, to reside in the said county, such importation is not contrary to law; but the sale of such slave in the said county, within three years after such importation, may entitle him to his freedom. *Negro John Battles v. Thomas Miller*, 296.
6. See EVIDENCE, 33. *Murray v. Dulany*, 343.

FREEDOM, (*Continued.*)

7. See EVIDENCE, 36. *Negro Phillis v. Gibson*, 359.
8. A deed of manumission, made to defraud the donor's wife, is void as to the negroes, as well as in regard to the wife. *Ibid.*
9. See AMENDMENT, 8. *Negro Thomas Butler v. Duvall*, 611.
10. It seems that the twenty-first section of the Maryland Act of 1796, c. 67, which requires that petitions for freedom should be only in the county where the petitioners reside, under the direction of their master, is only applicable to persons claimed as slaves by residents of Maryland. So far as the object of this section is to designate which of the county courts of Maryland should have jurisdiction, it is not applicable to this county, as there is only one county in the district to which the laws of Maryland can be applied. *Ibid.*
11. A petition for freedom is not a local action. The right is personal, and accompanies the person wherever he goes. The remedy is not confined to the courts of Maryland, nor is it necessary that the right to freedom should have accrued under the law of Maryland, nor in the county of Washington. *Ibid.*
12. A slave was brought into this county by her master, a delegate from Florida, to wait upon his family while he was attending Congress; and, at the end of the session, was left here until the meeting of the next Congress, with leave to hire herself out, and receive her wages for her own use, which she did until the return of her master, who was reelected, and who, at her request, offered to sell her to her husband, a free colored man, residing in Washington, for \$400, if he could raise the money, but he could not, and never paid it, or any part of it.

The Court (*nem. con.*) refused to instruct the jury, that these facts were not evidence of an importation contrary to the Maryland Act of 1796, c. 67.

They also refused to instruct the jury, that, upon that evidence, they ought to find their verdict for the defendant; but instructed them that the petitioner is not entitled to freedom under the first section of the act, unless she was brought into this county, by the defendant, for sale, or to reside therein; and that the circumstances stated, although found by the jury, are not conclusive evidence that the petitioner was brought into this county with such intent, or for sale; and that the residence contemplated by the first section of the act is a permanent residence, as contradistinguished from a sojournment.

The Court also refused to instruct the jury, that the defendant's offer and agreement to sell the petitioner to her husband, under the circumstances stated, was evidence of an importation, contrary to the act, unless they should believe, from the evidence, that the defendant had no intention, at the time of importation, that she should be sold, or should reside in this county. *Negro Maria v. Joseph M. White*, 663.

FREIGHT.

1. See CHARTER-PARTY, 2, 3. *Winter v. Simonton*, 104.
2. See AVERAGE, 2. *Catlett v. Columbian Insurance Company*, 192.

GAMING.

1. Upon an indictment for a nuisance in keeping a public gaming-house, the question, "who dealt the cards," is too general; the witness is not bound to answer it. *United States v. Strother*, 432.
2. Money won at billiards is money won at play within 9 Anne, c. 14, § 5, which section is in force in the county of Washington. *Sardo v. Fongeres*, 655.
3. A conviction under the by-law of 16 August, 1809, is no bar to an indictment for keeping a common gambling-house. *United States v. Holly*, 656.

GEORGETOWN BRIDGE COMPANY.

The Georgetown Bridge Company is bound to keep in repair the road leading from Georgetown to the little falls bridge, notwithstanding the Act of Congress of the 13th of July, 1813, "to incorporate a company for making a certain turnpike-road in the county of Washington, in the District of Columbia." *United States v. Georgetown Bridge Company*, 369.

GRAND JURY.

See FALSE PRETENCES, 9, 23. *United States v. Watkins*, 441.

GUARDIAN.

1. See APPEAL, 7, 8, 9. *Mauro et al. v. Ritchie*, 147.

GUARDIAN, (*Continued.*)

2. The authority of a guardian appointed by the Orphans' Court, under the power given by the Maryland Act, 1798, ch. 101, c. 12, § 1, continues until the full age of the infant; and such guardian cannot be removed, unless for refusal to give security when required by the Orphans' Court. *Ibid.*
3. After a guardian has been appointed by the Orphans' Court, the infant has no right at the age of 14, to choose another. *Ibid.*
4. By the common law it was only where there was a guardian in socage, or by nurture, (in which cases the guardianship continued only till 14,) that the infant had a right, at that age, to choose a guardian. *Ibid.*
5. Different kinds of guardian. 1st. In chivalry. 2d. In socage. 3d. By nature. 4th. For nurture. 5th. By statute. 6th. By custom. 7th. By the Chancellor. 8th. By the Ecclesiastical Courts. 9th. *Ad litem*. 10th. By election. *Ibid.*
6. Of the four kinds of guardians at common law, one only exists in Maryland, namely, guardian by nature.
Guardian by nature at the common law has no authority over the lands of an infant; but his authority over the person of the infant continues until he is of full age. *Ibid.*
7. The English statutes of 4 and 5 Philip & Mary, c. 8, and 12 Car. 2, c. 24, so far as they authorize a father, by his will, to appoint a guardian to his infant children, are in force in Washington County, D. C. *Ibid.*
8. Under the Maryland statutes, it seems that the guardian by nature has the custody of the estate as well as of the person of the infant until the age of 21; but the father was the only guardian by nature recognized by those statutes. *Ibid.*
9. If the infant have no father nor testamentary guardian, the Orphans' Court has the power to appoint a guardian to any infant who has an interest in lands by descent or devise; or is entitled to a legacy, or distributive share of the personal estate of an intestate. *Ibid.*
10. By the term "natural guardian," in the Act of 1798, must be intended such a natural guardian as is entitled to the guardianship of the estate as well as of the person of the infant. *Ibid.*
11. The Act of 1798, does not in any manner recognize the right of the infant to choose a guardian at any age. *Ibid.*
12. The Orphans' Court, whenever it has authority to appoint a guardian, may appoint him to the full age of the infant. *Ibid.*
13. An infant cannot choose a guardian, nor can the Court appoint a guardian, unless the infant be personally brought into Court.
14. A guardian cannot be removed without notice and citation to show cause. *Ibid.*
15. When the record set forth in the declaration is not the foundation of the action, but only matter of conveyance or inducement, *nul tiel record* is not a good plea, for it is no answer to the whole count.
When the record is showed forth in the declaration, the defendant may deny the operation thereof. *United States v. Little*, 251.
16. An order of the Orphans' Court that J. T. R. give bond as guardian to J. W. O. is not an appointment of J. T. R. to the office of guardian. *Ibid.*
17. A guardian appointed by the Orphans' Court continues until the infant arrives at full age; and he has not a right at the age of 14 to choose another. *Smoot v. Bell*, 343.
18. A guardian, appointed in Alexandria, who was also appointed by the Orphans' Court in Pennsylvania, and gave bond there, is not bound to account in Alexandria for money of his ward received in Pennsylvania. *Ibid.*

HAWKERS AND PEDLARS.

See BY-LAW, 1. *Corporation of Washington v. Townsend*, 653.

INDEBITATUS ASSUMPSIT.

1. If work and labor be done according to a special agreement, the plaintiff may recover upon a general *indebitatus assumpsit*. *Pipsico v. Bontz*, 425.
2. In Alexandria a colored man is not a competent witness for or against a white man. *Ibid.*

INDICTMENT.

1. See BANK, 3, 4, 5. *United States v. Forrest*, 56.

INDICTMENT, (*Continued.*)

2. The Court in Alexandria county will quash an indictment for misdemeanor unless the name of a prosecutor be indorsed thereon, although the defendant should have been bound by a recognizance before a justice of the peace to appear in this Court to answer for the offence. *United States v. Helrigle*, 179; *United States v. Hollinsberry*, 645.
3. If two be separately indicted for the same theft, and one be convicted, it is necessary for the United States, upon the trial of the other, to prove that it was a joint theft, and that both were present at the taking of the goods; but it is not necessary to charge in the indictment that the theft was joint; they may be indicted jointly or severally, as both are principals. If there be a doubt as to one whether he were present, he must be acquitted upon an indictment charging him as principal. *United States v. Holland*, 254.
4. See DEMURRER, 1, 2, 3, 4. *United States v. Watkins*, 441.
5. See CHALLENGE, 2. *Ibid.*
6. See FALSE PRETENCES, 4, 5, 6, 7, 8, 11, 23. *Ibid.*
7. See COMMON SCOLD, 1, 2. *United States v. Ann Royal*, 618, 620.

INFANT.

1. No contract of an infant is so absolutely void that it cannot be affirmed and made valid by the infant at full age. *Hyer et al. v. Hyatt et al.* 276.
2. An acknowledgment after suit brought will not avail the plaintiff, although made by the defendant after full age. *Ibid.*
3. All contracts by infants are voidable except for necessities; and even then the plaintiff can only recover the value of the articles furnished; the infant not being competent to bind himself absolutely as to price. *Ibid.*
4. See EQUITY, 11, 12, 13. *Hastings v. Granberry*, 319.

INJUNCTION.

1. See EQUITY, 1, 2, 3. *Kidwell v. Masterson*, 52.
2. See BAIL, 3. *Foyles v. Law*, 118.
3. See EQUITY, 10. *Oneale v. Caldwell*, 312.
4. A tenant for 99 years, renewable forever, with leave to purchase the reversion at a stipulated price, may be restrained by injunction from cutting and selling young and green wood, where the wood constitutes the principal value of the land. *Thruston v. Mustin*, 335.
5. The statute of Gloucester which gives the forfeiture of the thing wasted and treble damages, is in force in the county of Washington, D. C., and the defendant in equity is not bound to discover the waste, unless the plaintiff in his bill expressly waives the forfeiture and penalty. *Ibid.*
6. See DAMAGES, 7. *Mason v. Muncaster*, 403.
7. See EQUITY, 31. *Boone v. Small*, 628.

INSOLVENT.

1. A debtor of the United States had been discharged from custody by order of the President of the United States, under the act of the 3d of March, 1817, and had entered into an agreement with the marshal for the payment of his poundage-fees by instalments, with a proviso that if any instalment should not be paid when due, the marshal should take out a new *ca. sa.* for his fees. *Held*, that he could not be detained upon the new *ca. sa.* and the Court refused to order him to be committed. *United States v. Scott*, 66.
2. See COSTS, 2. *Law v. Scott*, 295.
3. See BAIL, 8. *Lee v. Gamble*, 374.
4. The debtor may avail himself of the discharge of his person under the Insolvent Act, against his creditor, although he did not name him in the list of his creditors, filed with his petition. *Ibid.*
5. A discharge of the person of the debtor does not impair the obligation of the contract; it affects the remedy only. *Ibid.*
6. See BAIL, 9. *Harrison v. Gales*, 376.

INSURANCE.

1. See AVERAGE, 1. *Vowell v. Columbian Insurance Company*, 83.
2. See " 2. *Catlett v. Same*, 192.

JOINT DEFENDANTS.

1. See AMENDMENT, 1, 2. *Bell v. Davis*, 4.

JOINT DEFENDANTS, (*Continued*.)

2. See EVIDENCE, 16, 17, 18, 19. *Patriotic Bank v. Coote*, 169.
3. See DEPOSITION, 4. *Panill v. Eliason*, 358.

JOINT THEFT.

- See INDICTMENT, 3. *United States v. Holland*, 254.

JUDGMENT.

1. See ESTOPPEL, 1. *Allen v. Magruder*, 6.
2. See EQUITY, 2, 3. *Kidwell v. Masterson*, 52.
3. See EXECUTION, 1. *Veitch v. Farmers Bank*, 81.
4. See BILLS AND NOTES, 11. *King v. Thompson*, 146.
5. See BAIL, 4. *McDaniel v. Riggs*, 167.
6. See DAMAGES, 4, 5. *Wood v. May*, 172.
7. See AMENDMENT, 4. *Bank of United States v. McKenney*, 173.
8. A judgment by default, and writ of inquiry, in the county of Washington, may be set aside at the next term, upon affidavit of merits, payment of costs, pleading to issue on the merits *instantly*, and offering ready for trial. *Reiling v. Bolier*, 212.
9. A judgment against the bank, in a suit upon the teller's bond, is not a bar to an action for money had and received by him, for the use of the bank. *Bank of United States v. Johnson*, 228.
10. See BILLS AND NOTES, 14. *Garey v. Union Bank*, 233.
11. The justice of the peace had rendered judgment in favor of "Rawlings & Son." The Court, upon appeal, reversed the judgment, because the party, plaintiff, was not named in the proceedings. *Rhea v. Rawlings*, 256.
12. If there be a general verdict for the plaintiff, and one of the counts be bad, the judgment must be arrested; but if there be one good count, a *venire facias de novo* may be awarded. *Mandeville v. Cookenderfer*, 257.
13. See AMENDMENT, 6. *Brown v. Gilles*, 363.
14. See DAMAGES, 7. *Mason v. Muncaster*, 403.
15. See EVIDENCE, 40. *Hadg v. Brotherton*, 594.

JURISDICTION.

1. See DESCENTS, 1. *Tolmie v. Thompson*, 123.
2. The Orphans' Court has no jurisdiction of a complaint against the executors of M. B., administratrix of R. B., by the "Representatives of R. B.," (not naming them,) to compel a distribution of the estate of R. B., there being an administrator *de bonis non* of R. B., who alone had authority to call on the executors of the original administrator of R. B., for the assets remaining in their hands. *Smith v. Billing*, 355.
3. See FALSE PRETENCES, 1, 2, 19, 25, 26. *United States v. Watkins*, 441.

JURY.

1. The question which may be asked of a juror, when called up to be sworn, is, "Have you formed and delivered any opinion as to the guilt of the prisoner?" *United States v. Devaughn*, 84.
2. If a juror, after having been summoned, voluntarily forms and delivers an opinion, as to the guilt or innocence of the prisoner, with a view to disqualify himself to serve on the jury at the trial, it is a contempt of court, inasmuch as it tends to the obstruction of justice. *Ibid.*
3. See APPEAL, 2. *Denny v. Queen*, 217.
4. See APPEAL, 3. *Smith v. Chase*, 348.
5. See CHALLENGE, 2. *United States v. Watkins*, 441.
6. See FALSE PRETENCES, 9, 17, 20, 21, 23, 24. *Ibid.*

JUSTICE OF THE PEACE.

1. See APPEAL, 1. *Thornton v. Corporation of Washington*, 212.
2. See APPEAL, 2. *Denny v. Queen*, 217.
3. See APPRENTICE, 1. *Charles v. Matlock*, 230.
4. See JUDGMENT, 11. *Rhea v. Rawlings*, 256.
5. See APPRENTICE, 2. *May v. Bayne*, 335; *Lynch v. Ashton*, 367.
6. See APPEAL, 3. *Smith v. Chase*, 348.
7. See EVIDENCE, 40. *Hade v. Brotherton*, 594.

JUSTIFICATION.

1. In an action upon the case for a libel, if the plaintiff aver that the words amount to a charge of forgery, and if the words, under the circumstances stated in the declaration, are capable of that construction, the defendant, if he would justify, must, in his plea, justify the words to that extent, and show, in his plea, a clear case of forgery. Whether the words are, under the circumstances stated in the declaration, capable of such a construction, is a question of law, to be decided by the Court. Whether the defendant used them in that sense, and intended thereby to charge the plaintiff with forgery, is a question of fact, arising upon the plea of not guilty, and exclusively to be decided by the jury, upon all the circumstances in evidence before them.
This question cannot arise upon the issue joined upon the plea of justification; because, by joining issue, the plaintiff has admitted the plea of justification to be good, if true. *Kerr v. Force*, 8.
2. The rule for construing words in a libel differs from the rule for construing averments in a plea. In the former case, the rule is that the words shall be understood, by the court and jury, in that sense which the author intended to convey to the minds of his hearers, as evinced by all the circumstances of the case; but the rule of construction as to pleas, and especially as to pleas in justification of libel, is, that they shall be taken most strongly against the party pleading, and that a man shall not justify by intentment, but every thing must be precisely alleged. *Ibid.*
3. The Court, in considering a plea, cannot infer one fact from another, as a jury may; but is as much restricted to the precise facts, as it is in considering a special verdict. *Ibid.*
4. A plea, in justification of libel, must be "certain to a certain intent in general;" it is, therefore, not true that a reiteration in the plea, of the words contained in the libel, with an averment that they are true, will be a good justification, unless the words of the libel should be so precise as to contain within themselves every thing that can be inferred from them. *Ibid.*
5. The matter, alleged in the justification to be true, must, in every respect, correspond with the imputation complained of in the declaration. In order to ascertain what is the imputation contained in the libel, the court must understand the words in the sense in which they think the writer intended they should be understood by those who should read or hear them. *Ibid.*
6. If a man, in a libel, says that he believes that another person committed a certain crime, his belief, although sincere, is no justification. *Ibid.*
7. It is actionable, in a libel, to charge the plaintiff with fraudulently deceiving a person, as to a fact, so as to induce him to indorse a note for a larger sum than he intended. *Ibid.*
8. In considering the language of a plea in justification, the court is not at liberty to exercise the same latitude of construction and inference, as it may in considering the words of a libel. It is not permitted to draw any inference of fact from the facts stated in the plea. *Ibid.*
9. If the libel charge the plaintiff with devising slanderous accusations against a person, the plea in justification is defective, if it does not aver that the plaintiff did devise slanderous accusations against him; and if it does not set forth the particular accusations devised. *Ibid.*
10. If the libel charge the plaintiff with moral obliquity, the plea in justification is defective, if it does not set forth any acts of moral turpitude. *Ibid.*
11. The expressions, "unfairly and secretly computed," "unjustly and unfairly attempted," and "artfully and purposely framed," used in a plea in justification, and in regard to the official act of a cashier, do not necessarily imply moral obliquity. *Ibid.*
12. Upon leave given to the defendant to amend his pleadings, the court will not receive pleas in justification which do not contain a justification of what they profess to justify. *Ibid.*
13. Where the plea professes to answer only a part of the actionable matter charged in the count, if the plaintiff, by his replication or demurrer, treat it as a plea to the whole matter, it is a discontinuance. But if the plaintiff, by his replication or demurrer, treat it as a plea to that part only which it purports to answer, it is no discontinuance, provided that, at the time of replying or demurring, he take judgment by *nil dicit* for that part of the count which is unanswered by the plea. *Ibid.*

JUSTIFICATION, (*Continued.*)

14. When several distinct and independent pleas are pleaded to different and separate parts of a count, the pleas are not double, and do not require the aid of the statute; and if the plaintiff may reply or demur to each plea, and take judgment by default, or *nil dicit*, as to all the matter not covered by each plea, in succession, so as ultimately to get judgment for all the matter contained in his declaration, yet, by the same process, the defendant, if his pleas are all good, and the issues or demurrers should be decided in his favor, will have made out a complete bar to the whole of the same matter; and, as the final judgment of the court must be given upon the whole record, the judgment must be for the defendant.

Where several distinct and valid pleas in bar are, by the leave of the court, under the statute, pleaded to the same count, and issues are taken thereon, if one of the issues be found for the defendant and the residue for the plaintiff, yet the judgment must be for the defendant.

So if several distinct and valid pleas be, by leave of the court, pleaded to one and the same part of the count, and issues be taken thereon, and one of the issues be found for the defendant, the judgment, as to so much of the count as is answered by the plea, must be for the defendant, although the other issues be found for the plaintiff. *Ibid.*

15. Where there are separate and distinct pleas to different parts of the count, and issues taken thereon, and some of the issues are found for the plaintiff and some for the defendant, several damages should be assessed, and judgment will be rendered for the plaintiff, as to the issues found for him; and for the defendant, as to the issues found for him.

And if, instead of taking issue, the plaintiff should demur to those pleas, (as he may safely do, without fear of discontinuance, if he confines his prayer for judgment on the demurrer to so much of his count as the plea professes to answer, and prays judgment by *nil dicit* for the residue,) and some of the demurrers should be decided in favor of the plaintiff, and some in favor of the defendant, the plaintiff would have judgment, and a writ of inquiry of damages, as to those decided in his favor, and the defendant would have judgment upon the others. *Ibid.*

16. If it appears, upon the whole record, that any actionable part of the plaintiff's declaration remains unanswered by a sufficient plea, the plaintiff must have judgment for so much, if he shall have prayed judgment at the proper time, so as to avoid a discontinuance; but if it appears, from the whole record, that every actionable part of the declaration had been fully answered by a valid plea in bar, the truth of which has been admitted in the pleadings, or found by the jury, the judgment must be for the defendant. *Ibid.*

17. If some of the several matters pleaded be good justification of what they profess to justify, and others be not, the plaintiff must demur to the latter, and plead over to the others. If he were to demur to the whole as one plea, and if one of the several matters pleaded should be a good justification of what it purports to justify, the demurrer must be overruled, in the same manner as a demurrer to a whole declaration would be overruled, if any one of the counts should be good. *Ibid.*

18. If an entire plea do not answer the whole count, or if a plea to a part of a count do not answer the whole part which it professes to answer, it is bad upon demurrer, and cannot derive aid from any other plea; but when a plea to part of a count is an answer to such part, it needs no aid from any other plea; it is sufficient for all that it professes to answer. *Ibid.*

19. If a plea be a good justification of what it purports to justify, the plaintiff cannot treat it as a nullity, and take judgment by *nil dicit* for the whole matter contained in his declaration. He must demur or reply to the plea, and take judgment by default for what remains unanswered.

If the plaintiff demurs to the plea, and prays judgment for the whole matter in his declaration, he admits that the defendant has answered to the whole matter, but answered badly; and as the plea professes to answer only part of that matter, the plaintiff, by such demurrer, impliedly abandons all that part which the plea does not profess to answer, and, therefore, discontinues his suit for so much; and a discontinuance as to part is a discontinuance as to the whole. *Ibid.*

JUSTIFICATION, (*Continued.*)

20. It is actionable, in a libel, to charge the plaintiff with such matters "as induce an ill opinion to be had of the plaintiff;" such as to charge him with maliciously devising slanderous accusations against a third person. *Ibid.*
21. A charge of moral obliquity must be proved by some act done *malâ fide*. *Ibid.*
22. A man cannot defame in one sense, and justify in another. *Ibid.*
23. The *dictum* of Starkie, "that the same degree of certainty and precision are required in this plea, as are requisite in an indictment or information," is not supported by the cases which he cites to confirm it. All the certainty that is required is, that the plea shall contain a clear and distinct statement of the facts which constitute the ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. *Ibid.*
24. An averment that the plaintiff did falsely, fraudulently, and unlawfully alter a note, so as materially to change the terms and conditions thereof, is a good plea in justification of a charge of forgery. *Ibid.*
25. If there be judgment for the plaintiff, upon demurrer to some of the defendant's pleas, and if issue of fact be joined to some of the defendant's other pleas, the jury impanelled to try the issues of fact may be charged to assess the plaintiff's damages upon the judgment upon the demurrers, in case they should find the issues of fact for the plaintiff; but this does not give the plaintiff a right to open and close the argument to the jury, where the defendant holds the affirmative of all the issues of fact. *Ibid.*

LARCENY.

See JOINT THEFT. *United States v. Holland*, 254.

LEGACY.

1. A legatee under the will of General George Washington received, by assignment from the executors, on account of his legacy, a bond and mortgage taken by them from a purchaser of the estate, which bond was for a sum larger than the legacy. The assignee covenanted not to hold the executors liable upon their assignment, and to pay back the surplus, and to indemnify and save harmless the executors from any damage, by reason of the assignment. The obligor became insolvent, and the sales of the mortgaged property did not produce the amount of the legacy. *Held*, that the estate of General Washington was not liable, under the Virginia Law of December 13, 1792, § 41, to make good to the legatee the deficiency; and, upon a cross bill, he was held liable to the executors for the amount in which the assigned debt exceeded the legacy. *Washington v. Washington*, 77.
2. Coffee in a bag, wine in bottles, and brandy in a cask, laid in by the testator for the current use and consumption of himself and family, did not pass under a bequest to his wife of "all his furniture and other household effects in both of his residences." The bag, bottles, and cask go with their contents, as incident thereto. *Foxall v. McKenney*, 206.
3. The words "all my servants" were limited to house servants, by the intention of the testator, as gathered from other parts of the will. *Ibid.*
4. A bequest of the use of the testator's "property" in a certain baking business, comprehends the use of the testator's servants employed therein. *Ibid.*

LIBEL.

1. See JUSTIFICATION, 1 to 25. *Kerr v. Force*, 8.
2. See BAIL, 2. *Withers v. Thornton*, 116.

LIEN.

1. A vendor who never had the legal estate in the land, and who has taken a separate security, has no lien for the purchase-money. *Strider v. King*, 67.
2. See EQUITY, 2. *Kurtz v. Hollingshead*, 68.
3. See BANK OF WASHINGTON. *Pierson et al. v. Bank of Washington*, 363.
4. The lien which a builder in Washington has, under the Maryland Act, 1791, c. 45, § 10, is a remedy *in rem* only, and not *in personam*. The lien commences with the recording of the contract for building, and does not overreach prior incumbrances. *Homans v. Coombe*, 365.

LIMITATION.

1. See AMENDMENT, 1. *Bell v. Davis*, 4.
2. After the cause of action was barred by the act of limitations, the defendant said he received the things, but paid for them by a check on the Bank of Washington, and referred the witness to the teller of the bank. Held not sufficient to take the case out of the statute. *Reynolds v. Calvert*, 211.
3. See BANK OF COLUMBIA, 1. *Bank of Columbia v. Moore*, 292.
4. An offer to compromise a debt, by paying one half without interest, is not sufficient to take the case out of the statute of limitations. *Bank of Columbia v. Sweeney*, 293.
5. See EQUITY, 16, 17, 18, 19. *Hayman v. Keally*, 325.
6. Possession of a slave, under an absolute bill of sale, without notice of a prior bill of sale by the same vendor to a trustee for the benefit of the vendor's wife and children, is adverse to the trustee, and if continued five years is a bar to his right of action, although the second deed was made with the consent of the vendor's wife. *Reardon v. Miller*, 344.
7. See EVIDENCE, 34. *Clarke v. Mayfield*, 353.
8. A declaration by the defendants to the marshal, at the time of serving the writ, (which did not specify the cause of action nor its amount,) that they would pay the debt if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act, is not sufficient to take the case out of the act of limitations, although the defendants were not arrested upon other judgments; but if the cause of action and its amount were mentioned to them at the time of such declaration, it may be left to the jury, and if they should find that the promise referred to that particular cause of action, it would be sufficient in law to take the case out of the statute. *Young v. Wetzel et al.* 359.
9. See ADMINISTRATION, 7. *Wilson v. Rose*, 371.
10. See FALSE PRETENCES, 14. *United States v. Watkins*, 441.
11. The fact, that the plaintiff brought an action in the name of the Corporation of Washington against the managers of the lottery, upon their bond to recover one fourth part of the prize drawn by No. 1037, which action was dismissed by the Corporation after it had been pending three years, is no bar to the plea of the act of limitations. *McCue v. Corporation of Washington*, 639.
12. See BILLS AND NOTES, 26. *Bank of Columbia v. Moore*, 663.

LOTTERY.

1. See CORPORATION OF WASHINGTON, 1. *Shankland v. Corporation of Washington*, 328.
2. *Id.* 3, 4. *McCue v. Corporation of Washington*, 639.

LUNATIC.

The Court will appoint a committee here to take care of the property of a person found lunatic in Maryland.

The mode of ascertaining lunacy is by a writ in the nature of a writ *de lunatico inquirendo*. *Burke v. Wheaton*, 341.

MANSLAUGHTER.

In 1827, manslaughter in the District of Columbia was punishable by fine and imprisonment. *United States v. Anderson*, 205.

MARITIME LAW.

The master of a steam ferry-boat is not liable for the wages of the hands. *Harris v. Nugent*, 649.

MARSHAL.

1. See INSOLVENT, 1. *United States v. Smith*, 66.
2. See ADMINISTRATION, 3. *Ex parte Ringgold*, 86.
3. See ATTACHMENT, 7. *Ringgold v. Lewis*, 367.
4. The plaintiff in a *ca. sa.* is liable to the marshal for his poundage as soon as he has taken the body of the defendant in execution upon that writ. *Mason v. Muncaster*, 403.
5. The plaintiff in a *fi. fa.* is also liable to the marshal for his whole poundage on the debt, if he levy goods to the value of the debt, whether they be sold or not.

MARSHAL, (Continued.)

If sold, and they produce less than the debt, he can claim poundage only upon the amount made. *Ibid.*

6. The original defendant is not liable in any form of action to the marshal, nor to the original plaintiff, for the poundage; nor is he or his property liable for poundage, unless the judgment be for a sum larger than the debt due by the defendant, to be released on payment of the amount really due, with costs; for the marshal cannot, on a *fi. fa.*, make more than the amount of the judgment, nor can he detain the debtor upon a *ca. sa.* for more than that amount. *Ibid.*
7. If the marshal has not returned the *fi. fu.* he may proceed to execute it for his poundage. *Ibid.*
8. See ELECTION, 1. *Peyton v. Brent*, 424.

MILITIA.

In order to justify the marshal for arresting a man for a militia fine, it is not necessary that the list of fines should have been delivered to him by the clerk of the court-martial within fifteen days after the session of the appellate court, as required by the fourth section of the Militia Act for the District of Columbia. *Ryan v. Ringgold*, 5.

MISDEMEANOR.

1. See INDICTMENT, 2. *United States v. Helriggle*, 179.
2. The name of a prosecutor must be written at the foot of every indictment for a misdemeanor, in Alexandria county, before it is sent to the grand jury, unless it be founded upon a presentment made upon the knowledge of two of the grand jurors, or upon the testimony of a witness called upon by the Court or the grand jury. *United States v. Shackelford*, 287.

MORTGAGE.

See ELECTION, 2. *Vowell v. Thompson*, 428.

NATURALIZATION.

See ALIENAGE, 1, 2. *Matthews v. Rae et al.* 699.

NEGLIGENCE.

For negligence of an agent, his principal only is liable.

It is negligence in a stage-office keeper to suffer a slave to go off in the stage-coach by means of a false certificate of freedom; and the stage-owners only are liable for the damages. *Mandeville v. Cookendorfer*, 397.

NEW TRIAL.

1. See BILLS AND NOTES, 6. *Coote v. Bank of United States*, 95.
2. If the jury take out the plaintiff's account, without the consent of the defendant, the Court will grant a new trial. *Hutchinson v. Decatur*, 291.

ORPHANS' COURT.

1. See ADMINISTRATION, 3. *Ex parte Ringgold*, 86.
2. See APPEAL, 7, 8, 9. *Mauro et al. v. Ritchie*, 147.
3. See GUARDIAN, 2 to 14. *Ibid.*
4. *Id.* 15, 16. *United States v. Little*, 251.
5. *Id.* 17, 18. *Smoot v. Bell*, 343.
6. See APPRENTICE, 1. *Charles v. Matlock*, 230.
7. *Id.* 2. *May v. Bayne*, 335.
8. The order of the Orphans' Court charging the administratrix with the whole amount of the inventory, did not change the ownership of the goods so as to make her the owner thereof in her own right. *Smith v. Billing*, 355.
9. See ADMINISTRATION, 7. *Wilson v. Rose*, 371.
10. Upon an issue from the Orphans' Court, *devisavit vel non*, the party contesting the will has a right to open and close the argument to the jury. *Carrico v. Kirby*, 594.
11. See DEPOSITION, 5, 6. *Walsh v. Walsh*, 651.

PARTITION.

1. See DESCENTS. *Tolmie v. Thompson*, 123.
2. See EQUITY, 11, 12, 13. *Hastings v. Granberry*, 319.

PARTNERSHIP.

1. See BANK, 1. 2. *Coote and Jones v. Bank of United States*, 50.
2. See BILLS AND NOTES, 6, 7, 8. *Id.* 95.
3. See ACCOUNT, 1, 2, 3, 4, 5. *Barry v. Barry*, 120.
4. See EVIDENCE, 16, 19. *Patriotic Bank v. Coote*, 169.
5. See EQUITY, 33. *Bartle v. Coleman*, 283.
6. See AGREEMENT. *Tingey v. Carroll et al.* 693.

PART-OWNERS.

One part-owner in a steamboat company who acted as master and engineer, cannot maintain an action at law, against his partners, for compensation as engineer. *Taylor v. Smith et al.*, 241.

PENALTY.

1. See DAMAGES, 1. *Goldsborough v. Baker*, 48.
2. See EQUITY, 25. *Robinson v. Cathcart*, 377.

PERJURY.

Perjury may be committed in an affidavit to an account for the purpose of getting it passed by the Orphans' Court. *United States v. Thomas*, 293.

PLEADING.

1. See ATTACHMENT, 1. *Baker v. Mix*, 1.
2. See EVIDENCE, 1. *Maret & Son v. Wood*, 2.
3. See AMENDMENT, 3. *Kerr v. Force*, 8.
4. See JUSTIFICATION, 1 to 25. *Ibid.*
5. See AUCTIONEER, 1. *Fowle v. Corporation of Alexandria*, 70.
6. See ADMINISTRATION, 4. *North v. Clarke*, 93.
7. See CHARTER-PARTY, 1. *Winter v. Simonton*, 62.
8. *Id.* 104.
9. In an action of debt on a replevin-bond, setting forth the condition, and averring special breaches, the plea of general performance is a bad plea; so is the plea of *non damnificatus*; so is the plea that the plaintiff had no property in the goods replevied; so is the plea of *nul tiel record*, if no record be averred in the declaration; and so is a plea to the whole declaration, which is an answer to a part only. *Wood v. Franklin*, 115.
10. See FLOUR INSPECTION, 1, 2, 3. *Cloud v. Hewitt*, 199.
11. See GUARDIAN, 15. *United States v. Little*, 251.
12. See JUDGMENT, 12. *Mandeville v. Cookenderfer*, 257.
13. Although the term should continue beyond the rule-day, the plaintiff is entitled to judgment by default, if the defendant did not plead by that day. *Fowle et al. v. Bowie*, 291.
14. See ADMINISTRATION, 6. *Wise v. Getty*, 292.
15. See AMENDMENT, 5. *Clarke v. Mayfield*, 353.
16. See ACCOUNT, 7. *Semmes v. Lee*, 439.
17. See AMENDMENT, 9. *Mandeville v. McDonald*, 631.
18. The remedy for a defective return of a *scire facias* against terre-tenants is not a plea in abatement, nor a motion by the defendants to quash the writ; but a motion to quash the return; but the return may be amended. The defendants may lay a rule on the plaintiff to declare; and the marshal's return to the *scire facias* will make part of the declaration, and the defendants will have time to plead. *Mandeville v. McDonald*, 631.
19. The terre-tenants warned may plead, in delay of execution, that there are other terre-tenants, in the same county not summoned. *Ibid.*
20. See CORPORATION OF WASHINGTON, 3, 4. *McCue v. Corporation of Washington*, 639.
21. See DEMURRER, 6, 7. *Ibid.*
22. See LIMITATION, 11. *Ibid.*
23. In replevin, in Alexandria, several counts cannot be joined in the cognizance. *Rotchford v. Meade*, 650.
24. If, after setting forth in the declaration, the condition of the bond, the plaintiff does not show in the declaration, a breach of the condition, the mere averment of non-payment of the penalty does not show a cause of action. *Hazel v. Waters*, 682.
25. See APPEAL, 4, 5, 6. *Tucker v. Lee*, 684.

POUNDAGE.

1. See INSOLVENT, 1. *United States v. Smith*, 66.
2. See ATTACHMENT, 7. *Ringgold v. Lewis*, 367.
3. See MARSHAL, 4, 5, 6, 7. *Mason v. Muncaster*, 403.

PRACTICE.

1. See AMENDMENT, 1, 2. *Bell v. Davis*, 4.
2. *Id.* 3. *Kerr v. Force*, 8.
3. See JUSTIFICATION, 25. *Ibid.*
4. See ATTACHMENT, 3. *Dowson v. Packard*, 66.
5. See CORPORATION, 3. *Fowle v. Corporation of Alexandria*, 70.
6. See CONTEMPT OF COURT, 1. *United States v. Devaughan*, 84.
7. See JURY, 1. *Ibid.*
8. See DISCONTINUANCE, 1. *Thompson v. Wells*, 5.
9. *Id.* 2. *Mitchell v. Wilson*, 92.
10. See INTEREST. *Potomac Company v. Union Bank*, 101.
11. See ACCOUNT, 1, 2, 3, 4, 5. *Barry v. Barry*, 120.
12. See CONTINUANCE, 1. *Higgs v. Heugh*, 142.
13. See BAIL, 4. *McDaniel v. Riggs*, 167.
14. See EVIDENCE, 16. *Patriotic Bank v. Coote*, 169.
15. *Id.* 18. *Ibid.*
16. See BARON AND FEME, 1. *Hollenback v. Miller*, 176.
17. See COSTS, 1. *Furlong v. Coleman*, 178.
18. See EQUITY, 6. *Brent v. Venable*, 227.
19. A prisoner arraigned for felony is to be placed in the criminal box, or dock, at the time of arraignment, but need not hold up his hand when called, if he admit himself to be the person indicted. *United States v. Pittman*, 289.
20. See PLEADING, 13. *Fowle et al. v. Bowie*, 291.
21. See ADMINISTRATION, 6. *Wise v. Getty*, 292.
22. See BILLS AND NOTES, 19. *Bank of United States v. Moore*, 330.
23. If the plaintiff be a trustee, the Court will not permit him to become *non-pros* without the consent of the *cestui que trust*, if the latter will give security to indemnify the plaintiff from costs. *Farmers and Mechanics Bank v. Gaither*, 347.
24. See BOOKS AND PAPERS, 3. *Macomber v. Clarke*, 347.
25. See CONTINUANCE, 2. *Ibid.*
26. See APPEAL, 3. *Smith v. Chase*, 348.
27. See CONTINUANCE, 3. *Fowle v. Bowie*, 362.
28. When the plaintiff holds the affirmative of any of the issues in a cause, he has a right to open and close the whole case. Upon the plea of property, the plaintiff in replevin has the burden of proof and the right to open and close. *Henderson v. Casteel*, 365.
29. See ACCOUNT, 7. *Semmes v. Lee*, 439.
30. See CHALLENGE, 2. *United States v. Watkins*, 441.
31. See FALSE PRETENCES, 9, 17, 20, 21, 23, 24. *Ibid.*
32. See ORPHANS' COURT, 10. *Carrico v. Kerby*, 594.
33. See AMENDMENT, 9. *Mandeville v. McDonald*, 631.
34. See BOOKS AND PAPERS, 4. *Triplett et al. v. Bank of Washington*, 646.
35. The Court will not at the trial, permit the defendant to amend his pleadings, unless they are satisfied of the justice of the defence intended to be made by the new pleas. *Allen v. Magruder*, 6.

PRISON-BOUNDS BOND.

1. See ESTOPPEL, 1. *Allen v. Magruder*, 6.
2. See AMENDMENT, 10. *Ibid.*

PROSECUTOR.

1. See INDICTMENT, 2. *United States v. Helriggle*, 179.
2. *Id.* 2. *United States v. Hollinsberry*, 645.
3. See MISDEMEANOR, 2. *United States v. Shackelford*, 287.

RENT.

1. See EVICTION. *McGunnigle v. Blake*, 64.
2. Upon a parol lease for one year, at \$600 per annum, and an occupation for two or more years, the plaintiff may recover for the whole time of occupation at

RENT, (*Continued.*)

- that rate in a count upon *indebitatus assumpsit* for \$1,000, although the use and occupation were not worth so much. *Dermott v. Tucker*, 92.
3. See DAMAGES, 4, 5. *Wood v. May*, 172.
 4. See DISTRESS, 1, 2. *Jenkins v. Calvert*, 216.
 5. *Id.* 4. *King v. Fearson*, 255.
 6. See COVENANT, 2. *Scott v. Lunt*, 285.
 7. In an action for use and occupation, if the rent be payable quarterly, the plaintiff may recover rent to the end of the quarter preceding the eviction, but not for the part of the quarter during which the eviction was. The same principle applies when the rent is payable yearly. *Bank of Columbia v. Galloway*, 353.
 8. See DISTRESS, 7. *Law v. Stewart*, 411.
 9. *Id.* 8. *Beall v. Beck*, 666.

REPLEVIN.

1. See DISCONTINUANCE, 1. *Thompson v. Wells*, 5.
2. See DAMAGES, 2. *Smith v. Hazel*, 55.
3. See DISCONTINUANCE, 2. *Mitchell v. Wilson*, 92.
4. See PLEADING, 9. *Wood v. Franklin*, 115.
5. See DAMAGES, 4, 5. *Wood v. May*, 172.
6. See DISTRESS, 1, 2. *Jenkins v. Calvert*, 216.
7. See DEED, 1, 2. *Mitchell v. Wilson*, 242.
8. See DAMAGES, 6. *Ringgold v. Bacon*, 257.
9. See FRAUD, 7, 8. *Travers v. Ramsay*, 354.
10. See JURISDICTION, 2. *Smith v. Billing*, 355.
11. See PRACTICE, 28. *Henderson v. Casteel*, 365.
12. In replevin the Court will, on motion, order a return of the property to the defendant, a constable who had taken it in execution upon a judgment against a third person, unless it shall appear to the Court that the possession was obtained by the defendant forcibly or fraudulently; or that the possession being first in the plaintiff, was obtained by the defendant without proper authority or right derived from the plaintiff. *Greenwell v. Boteler*, 7.
13. See DISTRESS, 4, 5, 6. *Ross v. Holtzman*, 391.
14. See FRAUD, 7. *Moore v. Ringgold*, 434.
15. See PLEADING, 23. *Rotchford v. Meade*, 650.
16. See DISTRESS, 8. *Beall v. Beck*, 666.

SALE.

1. See LIEN, 1. *Strider v. King*, 67.
2. See DESCENTS. *Tolmie v. Thompson*, 123.
3. See ESTOPPEL, 2. *Corcoran v. Brown et al.* 143.
4. If the purchaser of lots at a sale under a decree of this Court, neglects to pay the purchase-money, and suffers them to be sold for taxes, the Court will, upon the petition of the trustee, order so much of the property to be resold as will pay the taxes, and redeem the residue. *Hearne v. Barry*, 168.
5. See BILLS AND NOTES, 15. *Magner v. Johnson*, 249.
6. See EQUITY, 11. *Hastings v. Granberry*, 319.
7. See ASSETS, 2. *Law v. Law*, 324.
8. See EQUITY, 15, 16, 17, 18, 19. *Hayman v. Keally et al.* 325.
9. See LIMITATION, 6. *Reardon v. Miller*, 344.
10. See FRAUD, 7, 8. *Travers v. Ramsay*, 354.
11. See EQUITY, 29. *Bank of Columbia v. Dunlop*, 414.
12. *Id.* 30. *Little v. Ott*, 416.
13. A vendor of a city lot, in August, is not liable to the vendee for taxes for that year, not assessed until November, and not payable till the 1st of January following. *Hunt v. Smith*, 432.

SCIRE FACIAS.

1. See EXECUTION, 1. *Veitch et al. v. Farmers Bank*, 81.
2. *Id.* 5. *Ott v. Murray*, 323.
3. See AMENDMENT, 6. *Brown v. Gilles*, 363.
4. *Id.* 9. *Mandeville v. McDonald*, 631.

SEDUCTION.

- See EVIDENCE, 2, 3. *Mudd v. Clements*, 3.

SET-OFF.

A debt due by two joint debtors to two joint creditors cannot be set off against a debt due by one of the joint creditors to one of the joint debtors. *Langley v. Brent*, 365.

SLANDER.

1. See DAMAGES, 3. *Kelly v. Huffington*, 81.
2. See JUSTIFICATION, 1 to 25, inclusive. *Kerr v. Force*, 8.

SLAVE.

1. In an indictment under the nineteenth section of the Maryland Act of 1796, c. 67, for aiding and advising the transportation of a slave, there must be an averment of transportation from the district. *United States v. Abraham Williams*, 65.
2. See ATTACHMENT, 4. *Negro Richard v. Van Meter*, 214.
3. See DEED, 1, 2. *Mitchell v. Wilson*, 249.
4. See EVIDENCE, 28. *Mandeville v. Cookenderfer*, 257.
5. The tax upon slaves of non-resident owners, under the By-law of April 5, 1823, does not accrue until the hiring is complete. If the tax be paid and received before the prosecution is commenced, the owner is not liable to the penalty. *Whelan v. Corporation of Washington*, 292.
6. See FREEDOM, 4. *Negro Louisa v. Mason*, 294.
7. *Id.* 5. *Negro John Battles v. Miller*, 296.
8. See LIMITATION, 6. *Reardon v. Miller*, 344.
9. See DETINUE. *Bernard v. Herbert*, 346.
10. See NEGLIGENCE. *Mandeville v. Cookenderfer*, 397.
11. Slaves cannot be manumitted in Washington county, D. C., by last will, if over forty-five years old at the time the manumission is to take effect. *Wigle v. Kirby*, 597.
12. The owner of a female slave sold her, without reserving any reversionary right, and took a covenant from the vendee that he would set her free after twelve years' service, nothing being said of her increase in the mean time. *Held*, that parol evidence of the declarations of the vendor, that he had sold the slave for her full value as a slave, for life, was not admissible; and that the written evidence purported that the vendor had parted with his whole right in the slave to the vendee, and that the vendor was not entitled to the issue born after the sale. *Scott v. Auld*, 647.
13. See BILLS AND NOTES, 25. *Negro William Smith v. Parker*, 654.
14. A slave is not a competent witness against a free mulatto, not in a state of "servitude by law," in a prosecution for larceny, in Washington county, D. C., unless at the discretion of the Court, under the circumstances stated in the Act of Maryland, 1717, c. 13; and then the slave should not be forced or permitted to testify against her mother. *United States v. Charity Gray*, 681.

STEAMBOAT.

See MARITIME LAW. *Harris v. Nugent*, 649.

SURETY.

1. See BILLS AND NOTES, 16. *Bank of United States v. Lee*, 288.
2. *Id.* 17. *McDonald v. Magruder*, 298.
3. *Id.* 18. *Magruder v. McDonald*, 299.

TAXES.

1. See SALE, 4. *Hearne v. Barry*, 168.
2. See SLAVE, 5. *Whelan v. Corporation of Washington*, 292.
3. See EQUITY, 8, 9, 10. *Oneale v. Caldwell*, 312.
4. See DISTRESS, 4, 5, 6. *Ross v. Holtzman*, 391.
5. See DOWER, 2, 3. *Blodget v. Brent*, 394.
6. See SALE, 13. *Hunt v. Smith*, 432.

TERRITORY.

See BANK, 3, 4, 5. *United States v. Forrest*, 56.

TERRE-TENANTS.

See PLEADING, 17, 18, 19. *Mandeville v. McDonald*, 631.

TROVER.

1. See *BARON AND FEME*, 1. *Hollenback v. Miller*, 176.
2. See *DISTRESS*, 3. *King v. Fearson*, 255.

TRUST.

1. A deed conveying in trust, to secure certain creditors certain specified articles of personal property, does not protect from the general creditors articles purchased to supply the place of articles sold by the trustee, unless so stipulated in the deed of trust. *Letourno v. Ringgold*, 103.
2. See *CHARITABLE USES*, 1, 2, 3. *Barnes v. Barnes*, 269.
3. See *EQUITY*, 8, 9, 10. *Oneale v. Caldwell*, 312.
4. *Id.* 15, 16, 17, 18, 19. *Hayman v. Keally et al.* 325.
5. See *PRACTICE*, 23. *Farmers and Mechanics Bank v. Gaither*, 347.
6. See *ATTORNEY*, 1, 2. *Boone v. Clarke*, 389.

USE AND OCCUPATION.

- See *RENT*, 7. *Bank of Columbia v. Galloway*, 353.

USURY.

- See *BILLS AND NOTES*, 23. *Farmers and Mechanics Bank v. Gaither*, 440.

VARIANCE.

1. See *BILLS AND NOTES*, 9, 10. *Blue v. Russell*, 102.
2. If the legal effect of the instrument be the same, whether the words constituting a variance be inserted or not, the variance is not material. *Cannell v. Milburn et al.* 424.
3. See *BAIL*, 10. *Hyer v. Smith*, 437.
4. See *AGREEMENT*, 1. *Tingey v. Carroll et al.* 693.

VENDOR.

- See *ESTOPPEL*, 2. *Corcoran v. Brown et al.* 143.

VERDICT.

1. See *DAMAGES*, 5. *Wood v. May*, 172.
2. See *FALSE PRETENCES*, 20, 21. *United States v. Watkins*, 441.

VOLUNTARY SETTLEMENT.

- See *EQUITY*, 24. *Robinson v. Cathcart*, 377.

WASTE.

- See *INJUNCTION*, 4, 5. *Thruston v. Mustin*, 335.

WHARVES.

- See *CORPORATION OF WASHINGTON*, 2. *Kennedy v. Corporation of Washington*, 595.

WILL.

1. See *LEGACY*, 2, 3, 4. *Foxall v. McKenney*, 206.
2. See *ORPHANS' COURT*, 10. *Carrico v. Kirby*, 594.

WITNESS.

1. See *EVIDENCE*, 16, 18. *Patriotic Bank v. Coote*, 169.
2. A colored man is not a competent witness, in Alexandria, against a colored man indicted jointly with white men, for a riot. *United States v. James Birch et al.* 180.
3. By the law of Maryland, witnesses can be permitted to testify upon affirmation, only when they are members of some religious society who profess to be conscientiously scrupulous of taking an oath. *Bank of Columbia v. Wright*, 216.
4. The person whose paper is forged is a competent witness for the prosecution. *United States v. Brown*, 268.
5. See *EVIDENCE*, 31. *Bank of United States v. Washington*, 295.
6. See *GAMING*, 1. *United States v. Strother*, 432.
7. Before a witness can be admitted to testify upon affirmation, instead of an oath, the Court must be satisfied that he is one of a society who profess to be conscientiously scrupulous of taking an oath. If the witness is considered by the society of Quakers as a member of that society, in principle and religious profession, and usually meets with them for religious worship, and has applied to be admitted to a full participation of all the civil privileges and the moral dis-

WITNESS, (*Continued.*)

cipline of the society, he may be permitted to testify upon solemn affirmation, instead of an oath. *King v. Fearson*, 435.

8. See CHALLENGE, 2. *United States v. Watkins*, 441.

9. A witness is not bound to answer, before the grand jury, to a question, the answer to which might implicate himself; and he is the sole judge whether it will. The Court is to decide whether the answer could implicate the witness. *Sanderson's case*, 638.

10. See EVIDENCE, 42. *Bank of Alexandria v. McCrea*, 649.

11. See SLAVE, 14. *United States v. Charity Gray*, 681.

WRIT OF INQUIRY.

See JUDGMENT, 8. *Reiling v. Bolier*, 212.

END OF VOLUME THREE.

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